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THE

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BEFORE

THE HOUSE OF LORDS

AND THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

ALSO

PEERAGE CASES.

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VOL. XV.

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JUDGES AND LAW OFFICERS.

MEMORANDA.

1889. *Dec.* 5. THE RIGHT HONOURABLE SIR MICHAEL MORRIS, BART. *Lord Chief Justice of Ireland, was appointed a Lord of Appeal in Ordinary in the place of* LORD FITZGERALD, *deceased, and was created a Baron for life under "The Appellate Jurisdiction Act,* 1876," *by the title of* LORD MORRIS, *of Spiddal, Galway.*

1890. *Jan.* 31. THE HONOURABLE SIR HENRY MANISTY, *Judge of the High Court of Justice* (*Queen's Bench Division*), *died in Bryanston Square, at the age of* 81.

Feb. 10. ROLAND BOWDLER VAUGHAN WILLIAMS, *Q C, was appointed one of the Judges of the High Court of Justice, in the place of* MR. JUSTICE MANISTY, *deceased, and was afterwards knighted.*

In the same month THE HONOURABLE SIR WILLIAM VENTRIS FIELD, *one of the Judges of the High Court of Justice* (*Queen's Bench Division*), *resigned his office.*

Feb. 24. JOHN COMPTON LAWRANCE, *Q C., was appointed a Judge of the High Court in the place of* MR. JUSTICE FIELD, *and was afterwards knighted.*

April 10. SIR WILLIAM VENTRIS FIELD *was created a Baron of the United Kingdom by the title of* BARON FIELD, *of Bakeham, Surrey.*

ERRATA.

Page		*for*	*read*
197	last line but two.	J. B. Wood.	James G. Wood.
371	line 23	1 H. L.	5 H. L.

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In the First Series,
43 Ch. D.

In the Second Series,
24 Q. B. D. 15 P. D.

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BENGAL SECRETARIAT LIBRARY

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL

[HOUSE OF LORDS.]

H. L. (E.) 1889 Nov. 22.

GUSTAVE NOUVION . . . . . APPELLANT;

AND

FREEMAN AND ANOTHER . . . . . RESPONDENTS.

IN THE MATTER OF THE ESTATE OF WILLIAM HENDERSON DECEASED.

Foreign Judgment, Action on—Foreign Judgment not enforceable here unless final and conclusive—Res Judicata.

An action cannot be brought in this country upon a foreign judgment for the recovery of a debt, if the judgment does not finally and conclusively (subject to an appeal to a higher Court) settle the existence of the debt so as to become res judicata between the parties.

By Spanish law in certain cases summary or "executive" proceedings can be taken to recover a debt, and the plaintiff if successful obtains a "remate" judgment for the recovery of a sum of money. Such a judgment is final in those proceedings unless reversed or varied on appeal. In such proceedings the defendant can plead certain limited defences but cannot set up any defence affecting the validity of the contract. Either plaintiff or defendant, if unsuccessful in the "executive" proceedings, may in the same Court and in respect of the same subject matter take ordinary or "plenary" proceedings, in which all defences and the whole merits of the matter may be gone into. In the "plenary" proceedings

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the "remate" judgment cannot be set up as res judicata or otherwise. A "remate" judgment can be enforced by the plaintiff on giving security, although either an appeal or "plenary" proceedings may be pending. A "plenary" judgment renders the "remate" judgment inoperative and requires restoration of any moneys paid under it:—

Held, affirming the decision of the Court of Appeal (37 Ch. D. 244), that since a "remate" judgment does not finally and conclusively establish the existence of a debt no action can be brought upon it in this country.

APPEAL from a decision of the Court of Appeal (1).

The facts are stated in full in the report of the decision of North J. (2). For the present purpose the following outline will suffice:—

The present action was brought in May 1883 by the appellant against the executors of William Henderson, deceased, and claimed administration of his estate. The statement of claim alleged that the plaintiff had on the 5th of April 1878 recovered judgment against Henderson for a large sum of money for principal, interest and costs, in certain proceedings in the Court of the district of San Roman in the city of Seville in Spain; that those proceedings were brought to recover the balance of the purchase-moneys of mines in Spain, payable by virtue of two deeds of conveyance by the plaintiff to Henderson dated in 1872, and that Henderson brought an appeal against the judgment but afterwards abandoned it.

The statement of defence alleged that the judgment was not final nor such as would sustain the plaintiff's claim; that the cause of action was barred by the Statute of Limitations, 21 Jac. 1 c. 16; and that the execution of the deeds by Henderson was obtained by fraud. The defendants also counter-claimed for repayment of the purchase-moneys and for damages caused by the fraudulent representations by means of which Henderson was induced to buy the mines.

An issue was afterwards directed to be tried by a judge without a jury, whether the judgment was an order or judgment upon which the plaintiffs' claim in the action, or some and what part of it, could (apart from the question of fraud) be sustained.

At the trial of the issue before North J. evidence was given as

(1) 37 Ch. D. 244. (2) 35 Ch. D. 704.

to the nature of the proceedings in Spain and the Spanish law administered in that district. The effect of the evidence is set out in the judgment of North J. (1). Briefly it may be thus stated: The judgment of April 1878 was termed a "remate" judgment, and the proceedings were summary or "executive." Such a judgment is final in those proceedings unless reversed or varied on appeal. In such proceedings the defendant could plead such defences as payment or waiver, but could not set up any defence denying the validity of the contract. Either plaintiff or defendant, if unsuccessful in the "executive" proceedings, might in the same Court in respect of the same matter take separate and independent proceedings called "ordinary," "plenary," or "declaratory," in which the "remate" judgment could not be pleaded as res judicata or otherwise made use of. In such "plenary" proceedings all defences and the whole merits of the matter might be gone into. Judgment in the "plenary" proceedings practically rendered the "remate" judgment inoperative and required restoration of any moneys paid under it; but the "remate" judgment might be enforced on giving security so long as either an appeal or "plenary" proceedings were only pending.

The "remate" judgment in the present case directed that execution be carried into effect, that sale by auction of Henderson's property be made and with the proceeds payment made to the plaintiff of the principal, interest and costs. Such a judgment, in the opinion of the Spanish lawyers, made Henderson personally, as well as his estate, responsible for payment.

North J. decided in favour of the plaintiff and found that the judgment or decree of the Court of April 1878 was a judgment upon which the plaintiff's claim could apart from the question of fraud be sustained (2).

The Court of Appeal (Cotton, Lindley and Lopes L.JJ.) reversed that decision (3).

Nov. 21. *Napier Higgins* Q.C. and *Finlay* Q.C. (*Yate Lee* with them) for the appellant:—

The Court of Appeal took an erroneous view of the nature of

(1) 35 Ch. D. 707. (2) 35 Ch. D. 704.
(3) 37 Ch. D. 244.

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the "remate" judgment, which they held was not final and conclusive. Henderson had contracted to make himself liable to be sued in Spain in an "executive" action, that is in a summary manner. In that action he could not raise the defence of fraud or certain other defences: but there were defences which he could set up, such as payment. The judgment in that action made Henderson the plaintiff's debtor: the plaintiff was a judgment creditor for the amount recovered and costs. That judgment was final and conclusive: it was an end of the proceedings. True, the defendant might have brought a "plenary" or "ordinary" or "declaratory" action, a substantive independent suit, in which he could have raised the only case he professed to have, that of fraud. But he could not by any such proceedings stop or embarrass the "remate" judgment. The only way to stop the "remate" judgment was by appealing against it and compelling the plaintiff to give security for repayment if the "remate" judgment should be reversed. But that would not stop execution. Judgment in a "plenary" action would no doubt neutralise or paralyse the "remate" judgment, but the "remate" judgment would nevertheless remain. The nearest analogy in our law is to be found in the practice before the Judicature Acts, when a judgment in a common law action having been obtained the plaintiff might be restrained by the Court of Chancery from enforcing his judgment. But such a judgment would certainly be "final and conclusive."

The respondents did institute "ordinary" proceedings in Spain, and the Spanish Court appears to have held that those proceedings were not affected by the pendency of the present action in England. That decision was affirmed in Spain on appeal, and since then nothing has been done in the "ordinary" proceedings. The plaintiff having got the "remate" judgment could not, it is contended—though this is perhaps not clear upon the evidence—himself have brought "ordinary" proceedings: and if he could, it would have been unjust and oppressive. At the most the "remate" judgment was conditional or defeasible. But that does not prevent its being final and conclusive. The mere fact that the judgment is conditional is no reason why it should not be enforced here if the defeasance has not happened.

And if the plaintiff got judgment in the present action and the defendants succeeded in their "ordinary" proceedings in Spain the judgment in the present action could be stayed here by some proceedings in the nature of the obsolete auditâ querelâ. The pendency of an appeal in the foreign Court, it is well settled, is no bar to an action here on the foreign judgment: *Scott* v. *Pilkington* (1). Then why should the possibility of "plenary" proceedings be a bar? The foreign judgment created a personal obligation, and not merely a remedy against the property. That being so, this case comes within the principle that where a Court of competent jurisdiction adjudges a sum of money to be paid, an obligation to pay it is created, and an action of debt may be brought here upon the judgment: *Williams* v. *Jones* (2) per Parke and Alderson BB. The "remate" judgment is not like an interlocutory order, which cannot be enforced here because it is merely interim and is subject to revision by the same Court in the same proceedings: see *Patrick* v. *Shedden* (3). The respondents are not in any way prejudiced by the present action. They can raise here their only defence, viz. fraud, for the issue directed expressly saves that question. Suppose the time for bringing "ordinary" proceedings had expired, clearly the "remate" judgment could be sued on here. Then why can it not, subject to the liability of having "ordinary" proceedings brought? And if the respondents succeeded in their "ordinary" proceedings they could obtain a stay of execution here. All that the plaintiff asks is to be placed in the same position here as in Spain, and to have execution here unless the "remate" judgment is properly set aside. In any event the judgment for costs in the "executive" action can be sued on here, and that will be sufficient to maintain this action: *Russell* v. *Smyth* (4).

[They also referred to *Copin* v. *Adamson* (5) and the cases cited in the decisions below.]

Rigby Q.C. *Kenelm E. Digby* and *J. D. Davenport* for the respondents were not heard.

(1) 2 B. & S. 11, 38, 41.
(2) 13 M. & W. 628, 633, 634.
(3) 2 E. & B. 14.
(4) 9 M. & W. 810.
(5) Law Rep. 9 Ex. 345; 1 Ex. D. 17.

H L. (E.) 1889 NOUVION v. FREEMAN.

Nov. 22. LORD HERSCHELL :—

My Lords, this appeal arises in an action brought by the appellant, the plaintiff below, for the administration of the estate of a deceased gentleman named Henderson. In order to found his claim to an order for the administration of that estate it became necessary for him to shew that he was a creditor of the deceased. The case presented by him for the purpose of making that out was that he had obtained a judgment of a foreign Court upon which he was entitled to sue in this country, and which in this country established the existence of a debt. Under those circumstances the Court ordered that there should be first tried the issue, "whether the judgment or decree" upon which he relied, one pronounced on the 5th of April 1878, "and the other judgments or decrees whereof particulars have been delivered, or any and which of them, are orders or judgments upon which the claim of the plaintiff in this action or some and what part of it can be sustained."

It appears that Mr. Henderson, the administration of whose estate is in question, had purchased certain properties in the district of Seville of the plaintiff, Mr. Nouvion, and that the deeds by which these properties were conveyed, and which contained an obligation to make certain payments, were registered in the registry of the district of San Roman, and where deeds of that description are so registered, according to the law of Spain, the person who is entitled to payment under them can obtain what is called an "executive" judgment.

It is necessary to state distinctly what the nature of that judgment is; because I think it will be found that the decision of your Lordships must be determined by that consideration. In an action of this nature only a very limited number of defences can be raised by the person sued. He cannot impeach the instruments upon which the action is founded or shew that they were obtained by fraud, or that on any other ground they did not properly form the basis of an obligation on his part. He can only defend himself by such defences as are open to him on the assumption that the deeds were valid, and in the first instance did create the obligation. He may shew that there has been a waiver, or that he has discharged the obligation by payment or

otherwise, but substantially I think those are the only defences open to him. It is open to either of the parties to such an instrument to sue in the same Court in another form of action, which is called a declaratory or plenary action, and which is said to be the ordinary course, not as meaning that the other is a course which can only be taken under exceptional circumstances, but that the one conforms to the general and ordinary rules of procedure in an action in the Spanish Courts, and that the other is a special procedure allowed in particular cases. In such a plenary action, to which either of the parties may have recourse, every defence which may be available is open as well as every consideration establishing the ground of action; and such a plenary action may be instituted by either of the parties to the executive action; that is to say, the party against whom the decision has been pronounced in the executive action, be he plaintiff or defendant, is at perfect liberty to sue in a plenary action for the purpose of obtaining a declaration of the rights of the parties; and in such a plenary action the fact that a judgment has been delivered in an executive action cannot be set up as at all affecting the rights of the parties, either in the way of proof or of title to succeed in the plenary action. The same points which have been decided in the executive action can again be raised in the plenary action, as well as other questions which were not open in the executive action. No effect is given, in the Court in which it was pronounced and in which afterwards the plenary action may be pending, to the judgment in the executive action as being res judicata and as finally concluding the rights of the parties upon any point whatever.

My Lords, in the present case the plaintiff, Mr. Nouvion, who was a party to the agreements which I have mentioned, and which had been duly registered, brought an executive action, and in that executive action a decree was pronounced in these terms: "Let an order of execution be issued against the property and goods of Mr. William Henderson for the principal amount of 697,135 reales, 60 centimos, and also for the amount of the legal interests thereon from the date of default being made by not meeting" certain drafts which are there mentioned.

It appears that owing to the absence of Mr. Henderson from

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Spain it became necessary, in accordance with the procedure of the Spanish Courts, to send letters requisitorial to this country, that is to say, to Scotland, where Mr. Henderson was resident, and to obtain from the Spanish consul in Scotland a return to those letters, which intimated that Mr. Henderson had not discharged, as he would then have had an opportunity of doing, the liability which was declared by the judgment. Thereupon Mr. Henderson having intervened and having alleged that the debt was not due by reason of a promise of the plaintiff not to sue him, and that point having been decided against him, a decree was made, which I think may properly be termed a final decree in that action, that the distraint be carried into effect, "and in virtue thereof sale by auction be made of the property attached, and out of the proceeds thereof entire and complete payment to the executive plaintiff of the amount of the principal demanded" with interest and costs.

My Lords, the plaintiff relies upon that judgment as being sufficient to entitle him, when he sues upon it in the Courts of this country, to a judgment for the amount of the debt for which it was ordered that execution should issue, and the only question in this case is whether, under the circumstances which I have mentioned, that judgment is sufficient to entitle him in the courts of this country to a judgment for his debt as being a creditor of the deceased person, Mr. Henderson.

Now, my Lords, there can be no doubt that in the courts of this country effect will be given to a foreign judgment. It is unnecessary to inquire upon what principle the Courts proceed in giving effect to such a judgment, and in treating it as sufficient to establish the debt. Reliance was placed upon a dictum by Parke B. and Alderson B. in the case of *Williams* v. *Jones* (1), where the law is thus stated: "Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained." But it was conceded, and necessarily conceded, by the learned counsel for the appellant, that a judgment, to come within the terms of the law as properly laid down, must be a

(1) 13 M. & W. 628, 633.

judgment which results from an adjudication of a Court of competent jurisdiction, such judgment being final and conclusive. I shall of course have something to say upon the meaning which must be given to those words, but the general proposition in that form is not disputed by the learned counsel for the appellant. They contend that this judgment is final and conclusive, and no doubt in a certain sense that must be conceded. It puts an end to and absolutely concludes that particular action. About that there can be no manner of doubt—in that sense it is final and conclusive. But the same may be said of some interlocutory judgments upon which there can be no question that an action could not be maintained; they do settle and conclude the particular proceeding, the interlocutory proceeding, in which the judgment is pronounced. It is obvious, therefore, that the mere fact that the judgment puts an end to and finally settles the controversy which arose in the particular proceeding, is not of itself sufficient to make it a final and conclusive judgment upon which an action may be maintained in the Courts of this country, when such judgment has been pronounced by a foreign Court.

My Lords, I think that in order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that Court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our Courts for the payment of that debt.

The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a Court of competent jurisdiction, where according to its established procedure the

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whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be said that giving credit to the Courts of another country we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation. But where, as in the present case, the adjudication is consistent with the non-existence of the debt or obligation which it is sought to enforce, and it may thereafter be declared by the tribunal which pronounced it that there is no obligation and no debt, it appears to me that the very foundation upon which the Courts of this country would proceed in enforcing a foreign judgment altogether fails.

It has been suggested that a judgment obtained in an "executive" action may be regarded as analogous to a judgment obtained in a common law action in the time prior to the Judicature Act, the execution of which might be restrained by a Court of Equity, so as to prevent the plaintiff who had succeeded in such an action from obtaining the fruits of his judgment. I do not think that such an analogy is a complete one; but even if it were more complete than I think it to be, it appears to me that it would afford very little assistance to your Lordships unless we could know what had been the course adopted with regard to such judgments in countries in whose system of law the same force and effect are given to foreign judgments as are given in the Courts of this country. Upon that point we have had no information whatsoever.

Then, my Lords, it is said that such a judgment is analogous to a judgment which has been obtained upon which a suit may be instituted in the Courts of this country, even although an appeal may be pending. It appears to me that there is a vital distinction between the two cases. Although an appeal may be pending, a Court of competent jurisdiction has finally and conclusively determined the existence of a debt, and it has none the less done so because the right of appeal has been given

whereby a superior Court may overrule that decision. There exists at the time of the suit a judgment which must be assumed to be valid until interfered with by a higher tribunal, and which conclusively establishes the existence of the debt which is sought to be recovered in this country. That appears to me to be in altogether a different position from a "remate" judgment, where the very Court which pronounced the "remate" judgment (not the Court of Appeal) may determine, if proper proceedings are taken, that the debt for which this "remate" judgment is sought to be used as conclusive evidence has no existence at all.

My Lords, the plaintiff in such a suit, an executive suit, is not, by the decision which is now under appeal, deprived of his rights. He may still sue upon the original cause of action. Of course it may happen, as in this particular case, that such a suit is barred by lapse of time, but that is an accident. The right of the plaintiff to sue on his original cause of action is not at all interfered with by the judgment which has been pronounced; and in such an action, if it were brought, all questions upon which the rights of the parties depend, and by the solution of which the obligation to pay must ultimately be determined, would be open to consideration and could be dealt with by the Courts, and finally and conclusively settled. I do not, therefore, see that there is any wrong or any hardship done by holding that a judgment which does not conclusively and for ever as between the parties establish the existence of a debt in that Court cannot be looked upon as sufficient evidence of it in the Courts of this country.

Very ingenious arguments have been urged upon your Lordships by the learned counsel for the appellant, and they have strenuously contended that the proper course would be to permit such a judgment to be sued upon and that justice might be done by staying proceedings as might be done in the case of an English judgment sued upon, which was under appeal.

But no authority has been cited, no case has been referred to, which supports the view put forward on the part of the appellant that an action upon such a judgment as this could be maintained, and I certainly cannot advise your Lordships to make such a precedent, because it appears to me, after giving due

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weight to all the arguments of the learned counsel for the appellant, that on the whole the result would as a general rule be likely to be mischievous and to work injustice rather than justice between the parties.

For these reasons I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON :—

My Lords, this case has been very ably argued for the appellant. But the reasons assigned for the judgment of the Court of Appeal are to my mind so satisfactory that I agree with your Lordships in thinking it ought not to be disturbed.

That the Court of Seville had jurisdiction to determine all questions competently raised between these parties, when duly convened before it, in relation either to the constitution or subsistence of the contract upon which the appellant relies—and also that the Courts of England would recognise and give full effect to any final and conclusive judgment of the Spanish Court upon these questions—are propositions neither disputed by the respondents nor controverted in the opinions delivered by the learned judges of the Appeal Court. The only question which the facts of this case present for decision is, Whether the decree of the 5th of April 1878, obtained by the appellant in what is termed an "executive" proceeding, comes within the principle established by decisions comparatively recent, of which *Godard* v. *Gray* (1) and *Schibsby* v. *Westenholz* (2) are leading examples.

The decree of the 5th of April 1878 appears to me to be deficient in certain particulars which are necessary in order to bring it within that principle. It is not necessarily a decision which exhausts the merits of the controversy between the parties, because in "executive" proceedings the Court can entertain no plea stated by the defendant which does not go to payment, satisfaction, or waiver of the plaintiff's claim. What, in my opinion, constitutes a still graver defect is the fact that the same Court which issued the "executive" decree has jurisdiction, in

(1) Law Rep. 6 Q. B. 139. (2) Law Rep. 6 Q. B. 155.

an "ordinary" or "plenary" action, to entertain and dispose of any and every plea which the original defendant may think fit to urge against his liability, and in that action can re-try those pleas which have already been put forward and repelled in the "executive" suit. If the decision of the Court in the "plenary" differs, in whole or in part, from that pronounced by it in the "executive" suit, the latter is, to the extent of that difference, superseded or nullified.

The English cases to which I have already referred establish a more liberal rule in regard to the enforcement of foreign judgments than is to be found in the older authorities; but no decision has been cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it. All the authorities cited appear to me, when fairly read, to assume that the decree which was given effect to had been pronounced causâ cognitâ, and that it was unnecessary to inquire into the merits of the controversy between the litigants, either because these had already been investigated and decided by the foreign tribunal, or because the defendant had due opportunity of submitting for decision all the pleas which he desired to state in defence. In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it; and if appealable the English Court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal. The case of *Patrick* v. *Shedden* (1) appears to me to be very much akin to the present. There the executive decree of the Court of Session for costs was final in this sense that it was not appealable, and that it was enforceable in Scotland; but the Court of Queen's Bench refused to recognise it as a final and conclusive judgment, mainly on the ground that it might be at any time recalled or modified by the Court of Session on just cause shewn. In my opinion there is no real difference, in principle, between the case of a Court retaining power to alter

(1) 2 E & B 14.

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a decree by an order in the same suit, and the case of its retaining power to defeat the operation of that decree by an order pronounced in another suit relating to the same debt.

I accordingly concur in the judgment proposed.

LORD BRAMWELL:—

My Lords, I think this judgment should be affirmed. I think the proceeding in the Spanish Court which is relied on was final to this extent, that no further proceedings could be taken on it; and I think, also, that it was a personal judgment, as far as such a judgment could be personal; but I also think I am right in reading it, not as a judgment that a debt is due, but as an order that execution do issue. Then, my Lords, if so, this is what I may call, for want of a better expression, a defeasible judgment —that is to say, the defendants who are subject to the order that execution may issue, may take proceedings which would have the effect of defeating or nullifying or making an end of the judgment or order which has been pronounced that execution may issue. It seems to me that that is not such a judgment as can be (to use the old-fashioned expression which Baron Parke used) the subject of an action of debt—that is to say, now that we have got rid of the forms of action, the subject of an action in a court in this country. Whether what is called the comity of nations had anything to do with the matter, I do not know; nor do I think it material. Baron Parke, in the judgment he pronounced, does not refer to the comity of nations as a reason, but he speaks of foreign judgments, and of colonial judgments, and of judgments of inferior Courts; and he seems to consider that where the judgment of a competent Court has been given it shews that there is a debt, and that that being so, there is a legal obligation on the part of the person against whom it was decreed or adjudged that there was a debt, to pay it. But, my Lords, how is that applicable to a case of this description? How can it be said that there is a legal obligation on the part of a man to pay a debt who has a right to say, "I owe none, and no judgment has established against me that I do?" I cannot see. On this ground, it seems to me that this judgment ought to be affirmed.

There are however, my Lords, one or two other observations I should like to make. It was said that the argument I am now using would equally apply to all cases where there was a possibility of error being brought. Not so. There is no presumption that error may exist in the proceedings; the presumption is the other way: the presumption is that a Court of competent jurisdiction has given a right judgment. But there is no such presumption here; on the contrary, we learn that it is possible, not merely that what was decided in the Court may be nullified, but that there may be questions raised between the parties which could not be decided in the former proceeding. There is an essential difference, therefore, between the case where a Court of competent jurisdiction has entertained all the controversies between the parties which they could and chose to raise, and come to a conclusion, which is to be presumed to be accurate, and this case where there is no ground for saying that all possible controversies between the parties have been decided.

Then, my Lords, another argument that was urged was this; it was said, "Why, if this reason is a good one, there never was a judgment in an English Court upon which an action ought to have been maintainable, because it was always possible that it might be nullified by proceedings in equity." Really I do not think any argument can be founded upon what I may take the liberty now of calling the preposterous condition of things that existed in England before the Judicature Act, where one Court gave a final judgment finding a debt due, or damages due, or what not, and another Court with the same Judge said, "Well, that is all very well; I gave judgment for you yesterday and it was perfectly right in point of law; but if you, the plaintiff, in whose favour I gave it, enforce it, I will put you in prison." I think that some twenty or thirty years hence, when the present generation of lawyers have ceased to exist and there is another one, it will scarcely be believed that such a state of things did exist in a civilized country. I do not say this for the purpose of finding fault with that state of things, which is now, happily, at an end; and which was brought about, I daresay, by persons who had very sincere desires to improve the jurisprudence of the country; but I say it for this purpose, that I do not think

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you can found any argument upon such a condition of things as then existed.

There was a matter brought forward prominently by my noble and learned friend on my left (Lord Ashbourne) which I think is entitled to consideration; and that was, that if we should give judgment for this plaintiff here he would be better off than he would be if there were a mere affirmance of the judgment with all its consequences in Spain, because in Spain the judgment that he has got is liable to be defeated; but if judgment were given for him here, there would not be that liability to be defeated by proceedings being taken here analogous to the plenary proceedings in Spain. It occurred to me that perhaps that might be met in this way. If a judgment in a foreign court were reversed upon error, and an action upon the judgment had been brought in an English court and judgment given in that action on the judgment, then afterwards, when the original judgment was reversed upon error, I suppose there would, in such a case as that, be some remedy for the defendant who had got rid of the first judgment against him. The remedy of auditâ querelâ is now abolished, but there is a rule which says that the Court may give relief (I should suppose that would mean that they must give relief) where the defendant would have got relief upon auditâ querelâ. But the answer is, it is not the same thing. He would have a judgment against him in the Spanish Court which he would have to get rid of; and then he would have to come to England to get rid of the judgment here by proceedings in the nature of the old-fashioned auditâ querelâ. I think, therefore, he would be worse off if judgment were given against him, as is prayed in this action, than he is at present by the proceedings in Spain. It perhaps is not of any very great consequence; but I think it is worth mentioning for the purpose of shewing that we are not dealing with a judgment like a judgment in proceedings where all the questions can be gone into, which is presumably right, and which has decided all the possible controversies that the parties have thought fit to bring before the Court.

Upon these grounds, my Lords, I think this judgment should be affirmed.

LORD ASHBOURNE :—

My Lords, I also am of opinion that the judgment under appeal is correct and should be affirmed. The reasons which have led me to that conclusion have already been expressed by such of your Lordships as have spoken.

My Lords, it is conceded—there is no controversy—that a foreign judgment will not be upheld in this country and made the foundation of relief here, unless it is final and conclusive. That has been treated as axiomatic in the arguments on both sides, and in the judgment of North, J., and in all the judgments of the learned judges who sat in the Court of Appeal. The sole controversy in law before us and before those tribunals was: Is this a judgment which can be regarded as coming within the definition of a final and conclusive judgment?

I entirely concur that in a sense this may be regarded as a final judgment, but only in a limited and narrow sense. It is a summary judgment, it is an executive judgment, it is a "remate" judgment. In its terms there is nothing to contradict the fact that there has been a final judgment; but then it is a judgment upon a claim which could only be encountered by a certain limited number of pleas of a certain prescribed and definite character. It was not a judgment upon a claim which could be met by pleas upon the merits, going exhaustively into all the topics upon which the defendant was entitled to rely if he had the wide scope open to him which in any plenary suit a litigant would have. Therefore in no sense can this be regarded as an adjudication in a cause where the merits were, or where they could be, tried; and I am not aware of a single precedent where in this country effect has been given to a foreign judgment so obtained. No such case has been suggested in the course of the argument, and none was suggested in the courts below. This is a peculiar judgment. There is no analogy to it that I know of in our law; none has been stated. Cases were mentioned as approximations to an analogy; but no judgment known to our law or to the law of Scotland has been suggested which is at all really analogous to this peculiar form of "remate" judgment, which may be nullified, which may be paralysed, which may be reduced to a state of absolutely worthless paper by a proceeding

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in which the merits can be gone into. We are really asked to say that this judgment shall be accepted by our laws as final and conclusive, when the laws of Spain itself, which produced the judgment, say that it is one which is so little final and conclusive that it may be absolutely swept away when proceedings come before the Court in which the merits can be gone into.

My Lords, it would be, I venture to think, a very startling result if in this country we should hold this executive, summary, "remate" judgment to be final and conclusive, while in the municipal institutions of the country which has sent out this judgment it would not even be regarded as res judicata. That is a point referred to with force and persuasiveness in the arguments addressed to the Court below, and strongly in the judgment of Lindley L.J., and I adopt everything that he said. It strikes my mind as being to the last degree surprising to listen to a suggestion that when the laws of Spain do not regard this judgment as of such a binding character that it can be relied upon in any proceeding as res judicata, the very minute the intervention of a foreign country is invoked it becomes so sacrosanct that it is to be regarded by us as final and conclusive. It appears to me to be almost a contradiction in terms to make the suggestion.

For these reasons, my Lords, I entirely concur in the decision at which your Lordships have arrived.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 22nd November 1889.

Solicitors for appellant: *Ewbank & Partington.*
Solicitors for respondents: *Freeman & Bothamley.*

[HOUSE OF LORDS.]

H. L. (E.)
1889
Dec. 9.

THE MIDLAND RAILWAY COMPANY AND THE KETTERING, THRAPSTON AND HUNTINGDON RAILWAY COMPANY . . . . . } APPELLANTS;

AND

THE REV. SIR FREDERICK LAUD ROBINSON, BARONET. . . . . } RESPONDENT.

Railway Company—Mines of Minerals under or near Railway—Minerals got by quarrying—Limestone—Notice by Owner of intention to work—Railways Clauses Act 1845 (8 & 9 *Vict. c.* 20) *ss.* 77, 78, 79.

The "mines of coal, ironstone, slate and other minerals" which sect. 77 of the Railways Clauses Act 1845 excepts out of the conveyance to the railway company, and the "mines or minerals" under the railway, or within the specified distance, which sect. 78 empowers the owner to give notice of his intention to work, include not only beds and seams of minerals got by underground working but also such as can only be worked, and according to the custom of the district would be properly worked, by open or surface operations.

So *held* by Lords Herschell and Watson, Lord Macnaghten dissenting and retaining the opinion he expressed in *Lord Provost of Glasgow* v. *Farie* (13 App. Cas. 657).

To justify an owner in giving such a notice it is not necessary that he should intend to work the minerals himself, but there must be a real and bonâ fide desire to work either by himself or by his lessees or licensees.

Limestone is a mineral within the meaning of the above sections.

The decision of the Court of Appeal (37 Ch. D. 386) affirmed.

APPEAL from a decision of the Court of Appeal (1).

In 1865 the Kettering, Thrapston and Huntingdon Railway Company purchased under their Act of 1862 from the respondent's predecessor certain portions of his lands in Northamptonshire. The Act incorporated the Railways Clauses Act 1845. The conveyance contained no special reference to mines or minerals. Through these lands (for about a mile and a half) the company

(1) 37 Ch. D. 386.

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made their railway which the Midland Railway Company afterwards acquired statutory power to work.

On the 25th of January 1886 the respondent gave the Kettering, &c., Company notice under sect. 78 of the Railways Clauses Consolidation Act 1845 that, as owner of the mines and minerals consisting of ironstone, limestone and certain other substances lying under portions of the railway and adjoining lands as shewn on a plan, he was desirous of working such mines and minerals and intended to work them after the expiration of thirty days from the service of the notice. Negotiations having failed, the appellants brought this action for an injunction to restrain the respondent, his servants, agents and workmen, from working the mines and minerals described in the notice, so as to injure the railway and works.

At the trial before Chitty J. it appeared that under the portions of the railway and adjoining lands referred to in the notice were beds of ironstone and limestone at depths varying from six to thirty-six feet. Portions of the beds under the lands adjoining the railway had been leased by the respondent to a coal and iron company. As to the rest of the beds, both those under the railway and those under adjoining lands, there was evidence that the respondent bonâ fide intended to work the minerals by his lessees or licensees. The custom in that district was to work ironstone and limestone by open or surface operations.

Chitty J. dismissed the action and that decision was affirmed by the Court of Appeal (Cotton, Lindley and Lopes L.JJ. (1)).

May 2, 3, 13. *Rigby* Q.C. and Sir *A. Watson* (*Beale* Q.C. and *W. Baker* with them) for the appellants:—

The ironstone, limestone, and other substances referred to in the respondent's notice, are not "mines and minerals" within the meaning of the Railways Clauses Consolidation Act 1845 sect. 77 and following sections. First, because they are to be got by open quarrying instead of underground workings. Upon this point the judgment of Lord Macnaghten in *Lord Provost of Glasgow* v. *Farie* (2) represents the appellants' contention. The statutory provisions in that case do not materially differ from

(1) 37 Ch. D. 386. (2) 13 App. Cas. 657, 687.

those of the Railways Clauses Act (1). The original and fundamental idea of "mines" is that of an underground working, in the first instance for the purpose of attacking fortifications and thence applied to the getting of underground minerals. In English law the word "mines" is exclusively connected with underground workings. This is clearly the meaning intended by the Railways Clauses Act. The heading of this group of sections is "with respect to mines lying *under* or near the railway." The power to inspect "mines" given by sect. 77 would not be necessary in the case of quarries or open workings, for they would be visible, and the company can inspect their own line at any time. Nor can the meaning of "mines" be extended by the use of the word "minerals." "Minerals" are mentioned

(1) The Railways Clauses Act 1845 (8 & 9 Vict. c. 20) enacts as follows:—

"And with respect to mines lying under or near the railway, be it enacted as follows:—

"77. The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

"78. If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee or occupier thereof, then he shall not work or get the same; and if the company, and such owner, lessee or occupier, do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

"79. If before the expiration of such thirty days the company do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate . . ."

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to meet the case of a licensee who has the right to search for minerals and take them where he finds them, but who is never owner, occupier, or lessee of a "mine." The question whether mines and minerals are within sects. 77 and 78 depends upon the mode in which the minerals are got according to the custom of the country. Unless they are in such a position that according to the custom of the country they must be got by underground working they are not within these statutory provisions. In very exceptional cases a mine may crop out on the surface but in the mass it is underground. The conveyance to the company passes not a wayleave but the actual surface. The Legislature cannot have intended to give the landowner leave to break up the railway line by quarrying. That is the inevitable result of aboveground working, whereas in underground working, though that result may happen, it is not inevitable, and in most cases does not happen. The distinction between mines and quarries is clearly pointed out in *Darvill* v. *Roper* (1) by Kindersley V.C. whose decision is a strong authority for the appellants; and see *Bell* v. *Wilson* (2). Old Inclosure Acts constantly emphasize the distinction by reserving "mines and quarries." The judgment of Kay J. in *Midland Ry. Co.* v. *Haunchwood, etc., Co.* (3) is the only decision at variance with the appellants' contention. The decision in *Lord Provost of Glasgow* v. *Farie* (4), where the authorities were fully discussed, did not conclude the present point, though the dicta of Lords Watson and Herschell are no doubt against the present appellants.

Secondly the respondent's notice was bad for more than one reason. Admittedly the respondent did not intend to work by himself; if at all it was by lessees or licensees. But the notice meant by the Act is a notice by the person who intends to work. In the words of Lord Cairns in *Smith* v. *Great Western Ry. Co.* (5) the notice can only be given by a person "who has a right to work and who is prepared to work the mines," and he is the person to whom the company must give the counter-notice. The respondent's notice was also bad because there was no bonâ

(1) 3 Dr. 294.
(2) 2 Dr. & Sm. 395, 400; Law Rep. 1 Ch. 303, 308.
(3) 20 Ch. D. 552.
(4) 13 App. Cas. 657.
(5) 3 App. Cas. 165, 178, 179.

fide intention to work either personally or by others, for the materials could not be got at a profit. It is manifest that this was so as to a great part of the area included in the notice, and a notice which is bad as to part is bad as to the whole. The legislature could not have intended to give an owner the power by notice to compel a railway company to purchase the minerals, when there was no real intention of working—see per Lord Watson in *Dixon* v. *Caledonian, &c., Ry. Cos.* (1). The intention here was nothing more than to give the notice and was merely vexatious. It is no answer to say that the compensation awarded by the jury would be very trifling. Going to arbitration is an expense, and in any case half that expense falls by the Act on the company, possibly the whole.

Sir *Horace Davey* Q.C. and *Romer* Q.C. (*Gye* and *William Radcliffe* with them) for the respondent:—

Upon the main point the authorities are all referred to in *Lord Provost of Glasgow* v. *Farie* (2), where the judgments of Lords Watson and Herschell are in favour of the present respondent. To the dictionaries there cited may be added that of Du Cange, from which it appears that the subterranean meaning of "mines" is the secondary, not the original one. The present case is free from the difficulty in *Lord Provost of Glasgow* v. *Farie* (2), for "mines of ironstone" are expressly mentioned in the Railways Clauses Act. The benefit intended by that Act to the railway company applies as much to surface minerals as to underground minerals. In sects. 77 and 78 mines and minerals must have the same meaning. If minerals got by quarrying are not within the exception of sect. 77, sect. 78 does not apply to such minerals, and the railway company would not be entitled to the benefit given by that section, and it will be necessary for the company to acquire in the first instance much more land than is needed for the line, for if they do not acquire it within the period of compulsory powers they never can. In these sections "mines" mean beds, seams, veins and strata of something not yet got. A mine is a body of minerals. The question cannot depend on the local custom of working, for if so the mines might

(1) 5 App. Cas. 820, 839. (2) 13 App. Cas. 657, 673, 680.

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be in the conveyance at one time and not at another, according as the custom varied. Again, the question might not arise till long after the date of the conveyance, when the custom could not be ascertained. In the case of slates the custom in some places is to get both by open and by underground workings. How can the right depend on the custom in such a case? or again, where the coal or iron crops out at the surface? As Lord Cranworth said in *Great Western Ry. Co.* v. *Bennett* (1), the legislature intended by these sections to create a new code as to the relations between owners and companies; when the owner wants to work the mines he is put in the same position as if he had never sold any part of the surface; on the other hand the railway has the benefit of compelling the owner to sell that which is necessary for the purpose of the railway. As large an application as possible should be given to the mutual benefits intended by this code. Once infringe the wholesome principles laid down in that case, the result is confusion. The questions as to the right of support and subsidence are dealt with in that case and in the cases there cited. There is no difference in principle between stripping off the surface and digging out the minerals, and working underground within six feet of the surface and so letting the railway down.

[LORD MACNAGHTEN referred to *Pountney* v. *Clayton* (2) where Brett M.R. said, "Even where the mines are to be deemed excepted out of the conveyance to the railway company, any one who by digging the land and not by the operation of mining, were to let down the surface on which was the railway, would be a trespasser, as he would be digging on the land of the railway company."]

Where the mines and minerals are reserved and open quarrying is the usual custom the right of so getting the minerals is also reserved. If it is necessary for the company to have the support they must buy it. [They also discussed *Aspden* v. *Seddon* (3); *Davis* v. *Treharne* (4); *Buchanan* v. *Andrew* (5);

(1) Law Rep. 2 H. L. 27, 40.
(2) 11 Q. B. D. 820, 833.
(3) 1 Ex. D. 496.
(4) 6 App. Cas. 460.
(5) Law Rep. 2 H. L. Sc., 286.

Earl of Jersey v. *Neath Union* (1) and the cases cited in *Lord Provost of Glasgow* v. *Farie* (2).]

As to the notice, it is said that it was too large; but that was for the benefit of the railway company. No objection was made for fifteen months during which negotiations went on. As for the point that the owner would work by licensees and not by himself, it is for the benefit of the railway company that only one notice should be given. If the owner had created new rights by granting licenses the licensees would have had to be compensated for their profits, as well as the owner for his royalties. Thus there would have been as many arbitrations as there were licenses, besides the arbitration with the owner, and the costs would have been much increased. The intention to work must mean working by himself or by his agents, lessees, or licensees.

Rigby Q.C. in reply referred to *R.* v. *Dunsford* (3) as to what was a mine for poor-rate purposes.

The House took time for consideration.

1889. Dec. 9. LORD HERSCHELL:—

My Lords, the main question in this case is whether certain beds of ironstone and limestone lying under and near the railway of the appellants are their property or the property of the respondent.

The appellant company, the Kettering, Thrapston, and Huntingdon Railway Company, whose railway and undertaking are now under statutory powers worked by the other appellants, the Midland Railway Company, purchased from the respondent's father and predecessor in title, in the year 1865, certain land on which a portion of their railway has been constructed.

The purchase was made by virtue of the Company's Act passed in 1862, which incorporated the Railways Clauses Consolidation Act 1845. The grant of the land contained no special provisions relating to the mines and minerals under the same. This being so, sect. 77 of the incorporated Act operated to except

(1) 22 Q. B. D. 555. (2) 13 App. Cas. 657.
(3) 2 Ad. & E. 568.

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from the grant any "mines of coal, ironstone, slate, or other minerals, except such parts thereof as were necessary to be dug or carried away or used in the construction of the works." It is admitted that there lay beneath the lands purchased, at depths varying from six to thirty-six feet, beds of ironstone and limestone, and it is not disputed that these are "minerals" within the meaning of the enactment just referred to. The principal question for your Lordships' determination is, whether these beds of ironstone and limestone are "mines of" ironstone and other minerals, according to the true interpretation of that enactment and therefore excepted from the conveyance to the company.

I say this, because although considerable difference of opinion existed amongst those of your Lordships who were parties to the judgment in *Farie's Case* (1), I think all were agreed that the words "mines of" had relation not only to the word "coal" but to "ironstone, slate, or other minerals" also. The turning point therefore of the decision upon this part of the case must be the interpretation to be put upon the word "mines" in sect. 77 of the Railways Clauses Consolidation Act.

It is contended on behalf of the appellants that the word "mines" is to be construed as applying only to those minerals which, according to the custom of that part of the country where they are situate, would ordinarily be won by underground workings, and that it does not comprehend minerals which according to such custom would be got by surface operations. It is contended on the other hand that the word comprehends all beds or strata of minerals without any reference to the method of working them.

I have already in *Farie's Case* (1), expressed my opinion as to the construction to be put upon the same words in a very similar enactment contained in the Waterworks Clauses Act. After carefully considering the able arguments addressed to your Lordships in the present case, I have seen no reason to alter the conclusion I then arrived at. I desire only to say that when I stated that in my opinion the reservation extended "to all such bodies of mineral substances lying together in seams, beds, or strata as are commonly worked for profit and have a value inde-

(1) 13 App. Cas. 657.

pendent of the surface of the land," I did not intend by these latter words to suggest that the value of the mineral substances at the time of the reservation was the test whether they were reserved or not. I used them in order to emphasize the fact that it was not every scattered piece of mineral lying under the land that could be called a "mine," but only mineral substances lying in seams, or beds, or strata.

In dealing with this case it must be remembered that all that your Lordships have to do is to interpret the words of this enactment and not to lay down (even if it were possible) any general rule as to the interpretation of the word "mines."

I doubt whether much assistance is to be obtained from the cases in which a construction has been put upon that word in instruments embodying merely agreements between the parties to them, unaffected by any statutory enactment. In such agreements, in the absence of a distinct indication of the contrary intention, it is always to be assumed that the reserved mines are only to be worked in such a manner as is consistent with the surface remaining undisturbed. And if this be true of minerals lying deep below the surface, it would be obviously out of the question to permit it to be disturbed by winning minerals which can only be wrought by surface operations. But in the case of mines reserved under sect. 77 of the Railways Clauses Act the case is different. It is clear that the mines reserved, if not purchased by the company, may be so worked as to interfere with the surface, the only limitation being that the working must be according to the usual manner of working such mines in the district where the same are situate.

The object of the 77th and following clauses was considered and explained in the *Great Western Ry. Co.* v. *Bennett* (1). Lord Cranworth said: "It was obviously the intention of the legislature in making these provisions to create a new code as to the relation between mine-owners and railway companies where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and if any mines were so near the

(1) Law Rep. 2 H. L. 27.

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surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered; nothing but the surface."

The effect of this legislation was obviously very advantageous to the railway companies, and inflicted no wrong upon the owner of the minerals. The company in the first instance paid only for the surface of the land, and for such minerals as had to be taken in the making of the railway. They enjoyed the support of the underlying minerals for an indefinite term without paying for it. The mineral owner, as I have said, suffered no wrong. He still retained the ownership of the minerals and the right to work them, which was all that he possessed before. The only burden imposed upon him, if it can be so called, was that when desirous of working the mines he should give the company an opportunity of purchasing them. It appears to me that these considerations point to the intention of the legislature having been to use the word "mines" in the widest sense that can properly be given to it. Why should the legislature have reserved, and exempted the company from the necessity of purchasing, beds of minerals lying at such a depth below the surface, or with superincumbent strata of such a character that the minerals would ordinarily be worked by underground operations, and compelled the company at once to purchase and pay for beds of minerals which would, in ordinary course, be won by surface operations? It is urged that in the latter case the working of the minerals would remove the very thing which the company had bought, and directly interfere with the existence of the railway. But it must be remembered that the surface might be rendered just as unfit for railway purposes by subterranean workings as it would be by operations from the surface. The learned counsel for the appellants asked what the company could be said to have acquired by the purchase of the land if its very surface could be directly interfered with by mining operations? I fully feel the force of this question and the difficulty which it involves. If this difficulty were altogether got rid of by the construction contended for by the appellants, I admit that a strong ground would be shewn for yielding to their con-

tention. But it was properly conceded by the learned counsel for the appellants that this was not the case. Where a "mine," within the meaning attributed to that word by them, cropped out at or near the surface on a part of the railway, the same difficulty would arise. For it was not denied that this would be part of the mine, and therefore within the reservation. So, too, although a seam of minerals may lie at such a depth beneath the surface of the land purchased that it would ordinarily be got by underground workings, yet owing to the works necessary for making the railway, be it a cutting or tunnel, the minerals may come to form the surface on which the railway rests. Such a seam would be a "mine" within the construction suggested, and therefore reserved to the landowner, together with the right to work it, and yet the same question might be asked, can it have been intended that such owner should have the right to take away the surface upon which the rails are laid?

It seems to me, too, that the appellants' construction, if adopted, would of itself give rise to serious difficulties and inconveniences. When land was to be taken for the purposes of a railway, it would be necessary to ascertain what minerals lay beneath the land, which would not, according to the usual manner of working in the district, be got by underground workings. For these would become the property of the railway company, and their value must of course be taken into account in fixing the price to be paid for the land purchased. And further the question what minerals were reserved, and therefore whose the property in them was, might have to be determined many years after the purchase by an inquiry, what was the usual mode of working in the district at the time of the conveyance, which perhaps might not have been the same as at the time when the controversy arose. And there are some cases where it might be almost impossible to say what minerals were, and what were not reserved. Beds of slate, I believe, exist which have been worked both by surface workings at the face, and by levels driven underground. How much of such seams of slate would be reserved, and how much fall to be purchased by the company, would, I think, on the contention of the appellants, be a question almost impossible of solution.

But besides this, under sect. 78 the owner of mines not under

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the railway, but within the prescribed distance from it, is bound to give notice before working, so that the company may have the option of purchasing. If the word "mines" bear the meaning I have attributed to it, the company need not concern themselves about the existence of minerals, whether near the surface or not, within the prescribed distance. But if it is to have the more limited construction contended for by the appellants, it would sometimes be necessary for the company not only to ascertain what minerals lie under the lands adjoining any embankments or other works which would be injured by the working of what I will call surface minerals, but also to purchase these minerals, and the land under which they lie, for the protection of their works from subsidence. For the common law right of adjacent support does not extend to the increased burden caused by buildings or other works, but is limited to that which the land requires in its natural state. And this is all the railway company would be entitled to apart from the implied grant of the right to all necessary support for the railway works from adjacent land in the same ownership as that conveyed to the company for the purpose of the railway.

Seeing, then, that the difficulties pointed out by the appellants are not avoided by adopting their view, and that its adoption would give rise to the difficulties and inconveniences I have pointed out, I think your Lordships will do well to construe the language used with the aid of the light that is thrown upon it by the intention of the legislature as manifested in the provisions relating to mines and minerals lying under and near the railway. And the considerations upon which I have dwelt point to the conclusion I have already indicated, that the widest construction ought to be given to the word "mines" which is possible, without improperly straining the language used.

Is there anything in the terms of the enactment compelling the narrower construction for which the appellants contend? I think not. Applying oneself to the consideration of the word "mines," apart from the document or context in which it is found, I cannot think that its natural meaning imports such beds or strata of minerals only as are ordinarily got by underground working. If aid is sought from the lexicons, and the definitions

there given are reviewed, I do not think that they afford support to such a construction. Dr. Johnson, I may observe, defines a "quarry" as a "stone mine." I see no reason to doubt the soundness of the view I expressed in *Farie's Case* (1), that in ordinary parlance the word "mines" is not used to describe unwrought beds of minerals. I think it is ordinarily applied only to beds of minerals which are being or have been wrought; but in the enactment with which we are dealing it is obviously impossible so to interpret the word. I have already pointed out why I think the meaning attributed to the word by the Courts, when contracts between individuals have been under consideration, does not afford a guide for construing this enactment.

These are my reasons for adhering to the construction which I put upon the words "mines of coal, ironstone, slate, or other minerals" in *Farie's Case* (1).

So far I have dealt with the case apart from authority; but it is not unworthy of consideration that the decided cases support the view adopted by the Court below. In the case of the *Great Western Ry. Co.* v. *Bennett* (2), Lord Chelmsford said: "That this section reserves to the mine-owner all the minerals, however near they may be to the surface, unless the company chooses to purchase them, appears very clearly from the exception of 'the parts necessary to be dug or carried away or used in the construction of the company's works,' as these will, of course, be the minerals lying nearest to the surface." I admit the force of the criticism of the appellants' counsel, that the words quoted by Lord Chelmsford do not necessarily lead to the inference he drew from them, inasmuch as in making the railway it might be necessary in cuttings or tunnels to carry away or use minerals lying far below the surface. But the fact remains that the noble and learned Lord intimated the opinion that all the minerals, however near they might be to the surface, were reserved. And the other learned Lords who took part in the judgment not only do not dissent from Lord Chelmsford's view, but use language which, I think, shews that they shared it. An opinion thus expressed ought not to be lightly departed from. It is impossible to say how many transactions in the last twenty years may have been carried through on this view of the law. There has been no

(1) 13 App. Cas. 657. (2) Law Rep. 2 H. L. 27.

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judicial expression of a contrary opinion that I am aware of until quite recently in *Farie's Case* (1), whilst both in this country and in Scotland the point has been actually decided in accordance with the view taken by the learned judges in the present case. Indeed, in the case of the *Caledonian Ry. Co.* v. *Dixon* (2), where the point was decided against the company by the Court of Session, although the case was brought to your Lordships' House by way of appeal upon another point, the railway company did not seek for a review of the decision of the Court of Session on the question now in controversy.

It remains for me to consider the subsidiary contention of the appellants, that the respondent was not in the present case "desirous of working" the mines. The first objection raised is that he had no intention of working them himself, that is, by his own servants, but only by lessees or licensees. I agree with the Court below that this objection cannot, upon the true construction of the section, be sustained. Then it was urged that there was no real desire to work, but only to compel the appellants to purchase the minerals. I quite concur with what Cotton L.J. said, that "there must be not only an expression of desire, but an honest actual existence of the desire to work either by himself or his lessees, to justify an owner in giving such a notice. If he gave the notice when it was obvious that there were no minerals, or that he could not possibly intend either to let or work them himself, that would be vexatious, and the Court would not allow that to be acted upon." But in the present case the learned judge who tried the action and the Court of Appeal have come to the conclusion that there was a real and bonâ fide desire to work. After considering the arguments insisted upon by the learned counsel for the appellants I find myself unable upon this point to differ from the Courts below. I am not a little influenced by the fact that the minerals on either side of the railway in the immediate neighbourhood of those now in question have actually been gotten by lessees of the respondent. It is urged that the minerals under the railway were left unworked, because the respondent thought he had no right to them. This matters not as regards the point I am now concerned with. Indeed, it seems to me to make the case of the respondent stronger.

(1) 13 App. Cas. 657. (2) See 5 App. Cas. at p. 823.

For the reasons I have submitted to your Lordships I think the judgment appealed from should be affirmed, and the appeal dismissed.

LORD WATSON :—

My Lords, I also am of opinion that both Courts below have come to a right conclusion in this case, and that the judgment of the Court of Appeal sustaining the decision of Chitty J. ought to be affirmed.

Questions of nicety have arisen, and may yet arise, as to the particular substances meant to be included in the general words "or other minerals," as these occur in sect. 77 of the English, and sect. 70 of the Scotch, Railways Clauses Act of 1845. I do not think that any substantial question of that kind is presented in this case. The substances to which the argument at the bar has been confined are "ironstone," which is one of the minerals specially excepted in these clauses, and "limestone," which appears to me to be so much ejusdem generis with the minerals enumerated that it must necessarily be held to come within the description of "other minerals."

The real point of difficulty which this case presents is due to the circumstance that the statutory exception is not of "minerals" but of "mines of minerals." It is mutually conceded that the ironstone and limestone beneath the appellants' railway, which the respondent has notified his intention to excavate, can only be worked, and according to the custom of the district would be properly worked, by open cast. But the appellants maintain that, according to the sound construction of the Act of 1845, no minerals are reserved to the landowner except such as are capable of being "mined," using that term in its strictest sense, as signifying operations conducted wholly underground, and not open to the light of day. That is a proposition which your Lordships had recently occasion to consider in *Lord Provost of Glasgow* v. *Farie* (1). In that case I came to the conclusion that every substance, being a mineral within the meaning of these clauses, is reserved to the owner irrespective of the method by which it may be wrought. I there said that, in the enactments

(1) 13 App. Cas. 657.

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of sect. 18 of the Waterworks Clauses Act 1847 (which are in the same terms with sects. 77 and 70 of the Railways Clauses Acts of 1845) the word "mines" must be taken to signify "all excavations by which the excepted minerals may be legitimately worked and got." I do not think it is necessary to say more than that I adhere to the opinions which I expressed in *Lord Provost of Glasgow* v. *Farie* (1). On consideration I think it may be more accurate to say that the expression "mines of coal, &c." is used by the legislature to denote the minerals in situ, without reference to the manner in which they can be worked; but the result is, in either view, the same and rests upon the same considerations. I concur in the reasons which have been assigned for his judgment by my noble and learned friend (Lord Herschell). After all, this is a mere question as to the period of time at which railway companies must acquire and pay for the subjacent and adjacent minerals necessary for the support of their lines. The general policy of the Railways Clauses Acts, and their special provisions, alike appear to me to point to the result at which the noble and learned Lord has arrived.

In my opinion the appellants have failed to substantiate their averment that the respondent does not entertain a real and bonâ fide intention of working the minerals in question; and I therefore concur in the judgment which has been moved.

LORD MACNAGHTEN:—

My Lords, the principal question, if not the only question, in this case is, what is the meaning of the word "mines" as used in sect. 77 of the Railways Clauses Consolidation Act 1845 and in the heading to that part of the Act? On this question I have the misfortune to differ from your Lordships. I abide by the views I expressed in *Farie's Case* (1). I continue to think that the word was used both in the heading and in the section in the sense which, if I am not mistaken, every English judge who had occasion to consider the meaning of the word before *Farie's Case* (1) was decided took to be its ordinary signification. It seems to me that on such a point the opinions of such judges as Kindersley V.C., Turner L.J. and Sir George Jessel are probably

(1) 13 App. Cas. 657.

a safer guide than any definitions or illustrations to be found in dictionaries. Kindersley V.C. was clear on the point. So was Turner L.J., who agreed with the Vice-Chancellor on that question in *Bell* v. *Wilson* (1) and dealing with an exception of "mines within and under the lands whether opened or unopened" observed that those are "words which are ordinarily used with reference to underground workings." In *Errington* v. *Metropolitan District Ry. Co.* (2), where contrary to the view thrown out by some of the noble and learned Lords in *Great Western Ry. Co.* v. *Bennett* (3), it was held that railway companies could acquire mines compulsorily, Sir George Jessel remarks: "There are no mines in the ordinary sense under these lands, at least it is not shewn there are. What are called mines and what are minerals probably within the meaning of the Act of Parliament are some beds of gravel or some beds of clay lying near the surface, and it is said they can only be worked from the surface."

If it was really the intention of Parliament that all minerals however worked should be deemed to be excepted from conveyances to railway companies unless expressly mentioned therein, I cannot conceive why the word "minerals" is not to be found in the heading to this part of the Act or why the word "minerals" was not used in sect. 77 instead of the expression "mines of coal, ironstone, slate or other minerals," or why the legislature in the heading and in that section avoided the use of the common, obvious, and well understood expression "mines and minerals."

Whether the view of the appellants or that of the respondent be accepted some difficulties and inconveniences unquestionably may present themselves. But I think the appellants were right in saying that the difficulties which attend their construction, however formidable they may appear in argument, are not really practical difficulties, and that those difficulties are reduced to a minimum since it has been decided that railway companies are not disabled from purchasing mines compulsorily if they think fit to do so.

It was said in argument that if the appellants' construction were adopted railway companies might be exposed to danger by

(1) Law Rep. 1 Ch. 303. (2) 19 Ch. D. 559.
(3) Law Rep. 2 H. L. 27.

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the working of surface minerals on adjacent lands. But in answer it was pointed out that if surface minerals are not within the enactment with respect to "mines lying under or near the railway" the ordinary rule as to adjacent support so far as regards surface minerals would be applicable.

Some reliance was placed on certain expressions in Lord Chelmsford's judgment in the *Great Western Ry. Co.* v. *Bennett* (1) which seem to shew that in his Lordship's opinion all minerals of whatever kind and however near the surface were reserved by the Act to the landowner. But it is to be observed that the question which has arisen in the present case could not possibly have arisen in *Bennett's Case* (1), because the exception in the conveyance under consideration in that case did not follow the words of the Act. It excepted in terms both minerals and mines. The point, therefore, possibly was not present to his Lordship's mind. On the other hand Lord Westbury's opinion seems to favour the appellants' construction.

That a railway company is not entitled to support from subjacent or adjacent mines is perfectly clear from the Act, as was pointed out in *Bennett's Case* (1). But I do not think that it necessarily follows from that circumstance that a mine owner who is entitled to withdraw support by working his mines in the ordinary course if the company do not compensate him is entitled to enter upon the surface, which unquestionably belongs to the railway company, and break it up by working from the surface.

For these reasons and the reasons I have expressed in *Farie's Case* (2) I should, but for your Lordships' opinion, be disposed to reverse the judgment under appeal.

Order appealed from affirmed and appeal dismissed with costs: Ordered (on the application of the parties by their counsel at the Bar) that this judgment be held to be a final judgment in the action and that the action be dismissed with costs.

Lords' Journals 9th December 1889.

Solicitors for appellants: *Beale & Co.*
Solicitors for respondent: *Capel Cure & Ball.*

(1) Law Rep. 2 H. L. 27. (2) 13 App. Cas. 657

[PRIVY COUNCIL.]

THE OCEAN STEAMSHIP COMPANY, OWNERS OF S.S. "HEBE" . . . } DEFENDANTS;

AND

APCAR AND COMPANY, OWNERS OF S.S. "ARRATOON APCAR". . . . } PLAINTIFFS.

J. C.* 1889 Nov. 7, 30.

THE "ARRATOON APCAR."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT AT SINGAPORE).

Collision—Regulations—Arts. 18, 22.

Where in a collision it appeared that one vessel had been navigated with reckless negligence and the other had committed a comparatively venial error in not slackening speed in good time:—

Held, that a regulation for preventing collisions at sea having been infringed by the latter vessel without necessity, it could not be absolved from the consequences prescribed by statute and must be held to be liable.

APPEAL from a decree of the Vice-Admiralty Court (August 3, 1888), in favour of the respondents' claims against the steamship *Hebe* and freight; also in favour of the respondents in an action brought by the appellants against the steamship *Arratoon Apcar*, and condemning the steamship *Hebe* and her bail in the amount to be found due to the respondents in the first action and in costs.

The circumstances are stated in the judgment of their Lordships.

The *Attorney-General* (Sir *R. Webster*), and *Kennedy*, Q.C. (*Aspinall*, with them), contended that the *Arratoon Apcar* should be either held alone to blame, or also to blame. That vessel improperly ported, and persisted in porting to a green light. After the green light of the *Hebe* was seen, the other vessel improperly neglected to keep her course and infringed art. 22

* *Present*:—LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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of the Regulations. Her engines also were not duly or in due time slackened, stopped, or reversed. Art. 18 was infringed. They further contended that the *Hebe* was not to blame. They cited *The Ceto* (1); *The Benares* (2); *The Beryl* (3); *The Khedive* (4).

Sir *W. Phillimore*, Q.C., and *Hollams*, for the respondents, contended that the *Hebe* was alone to blame, and that the collision was in no way caused or contributed to by those on board the *Arratoon Apcar*. The measures which they took, viz., putting her helm hard aport and stopping her engines afforded the only chance of averting a collision. Had her engines been reversed, the propeller being a left-handed one, the result would have been to neutralise the effect of the port helm and to have rendered a collision certain. Under the circumstances the Court below was right in holding that it was not necessary or proper to reverse the engines, and that non-compliance in this respect with art. 18 was justified. Reference was made to *The Jesmond* (5); *The Rhondda* (6); *The Emmy Haase* (7).

The *Attorney-General* replied.

1889 *Nov.* 30.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

The collision which led to this litigation took place in the Straits of Malacca on the 22nd of May, 1888, about 3.35 A.M., between the steamship *Hebe* and the steamship *Arratoon Apcar*.

Both vessels were under steam alone. The wind was southerly and moderate. The weather was fine, and the sky clear. The regulation lights of both vessels were in order and burning brightly.

Both vessels were considerably damaged by the collision.

Cross actions were brought in the Vice-Admiralty Court of the Straits Settlements. Each vessel accused the other of being the

(1) 14 App. Cas. 670.
(2) 9 P. D. 17.
(3) 9 P. D. 137.
(4) 5 App. Cas. 876, 882.
(5) Law Rep. 4 P. C. 1.
(6) 8 App. Cas. 549.
(7) 9 P. D. 81.

sole cause of the disaster. The actions were consolidated, and tried together. Judgment was given on the 3rd of August, 1888.

The learned Judge found the *Hebe* alone to blame. He accepted the account given by the witnesses for the *Arratoon Apcar*, and came to the conclusion that the *Hebe* was navigated with reckless negligence, and that the persons in charge of her at the time of the collision were, one and all, ignorant and incompetent.

From the decree founded on this judgment the owners of the *Hebe* appealed.

At the hearing before their Lordships the learned counsel for the appellants did not deny that the *Hebe* was to blame; but they contended that the evidence of the respondents' own witnesses proved that the *Arratoon Apcar* was also in fault.

The facts of the case as they may be gathered from the evidence on behalf of the *Arratoon Apcar* are in substance as follows:—The *Arratoon Apcar*, steering S. 60 degrees E., sighted the masthead light and the red and green lights of the *Hebe* when the two vessels were about five miles apart, and apparently as nearly as possible on opposite courses. The *Arratoon Apcar* was going about ten knots an hour at the time. She ported one point, and in about two minutes lost the *Hebe's* green light, and then she steadied on that course. Shortly afterwards the green light of the *Hebe* appeared again about two points on her port bow. The *Arratoon Apcar* then ported another point and again lost the *Hebe's* green light, and kept on that course until the *Hebe*, being about 2½ points on the port bow, suddenly shut out her red light and shewed her green light for the third time. It is impossible to determine the distance between the two vessels at this moment: but their Lordships think that the learned Judge was probably right in supposing that it must have been a little more or a little less than half a mile. The officer in charge of the *Arratoon Apcar* at once saw his danger. He gave the order "hard-a-port," and went himself to the wheel-house to make sure that the order was carried out. He saw his vessel beginning to come round before he left the wheel. Then he went to the telegraph and stopped the engines. The collision

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took place almost immediately afterwards, the starboard bow of the *Hebe*, which was still going full speed, striking the port bow of the *Arratoon Apcar* at something less than a right angle. The engines of the *Arratoon Apcar* were not reversed until after the collision.

On this state of facts it was contended by the learned counsel for the appellants that the *Arratoon Apcar* infringed the regulations for preventing collisions at sea in three particulars. They argued (1) that the *Arraton Apcar* ought to have slackened speed before the green light of the *Hebe* came into view the third time; (2) that the engines of the *Arratoon Apcar* ought to have been stopped and reversed at the time when the officer in charge gave the order "hard-a-port"; and (3) that at any rate the engines of the *Arratoon Apcar* ought to have been reversed as well as stopped before the collision.

The learned judge in the Vice-Admiralty Court, who does not seem to have had the assistance of nautical assessors, appears to have felt little or no difficulty upon any point of the case except upon the one question whether it was the duty of the officer in charge of the *Arratoon Apcar* to reverse as well as to stop. The excuse put forward at the trial for not reversing was that the *Arratoon Apcar* had a left-handed screw, and that its action would have "deadened" the effect of the port helm if the engines had been reversed. With some hesitation the learned judge accepted this excuse, and exonerated the *Arratoon Apcar* from all blame.

Their Lordships are however compelled to take a different view. They are advised by their nautical assessors that before the green light of the *Hebe* appeared the third time there were sufficient indications to the officer in charge of the *Arratoon Apcar* (supposing him to have been a person of ordinary skill using reasonable care) to shew that the two vessels were approaching so as to involve risk of collision. They are further advised that a prudent seaman in the position in which that officer was placed by the conduct of those on board the *Hebe* would have stopped, or, at least, have slackened speed, until the course of the approaching vessel could be made out with something like certainty.

Under any circumstances their Lordships would be slow to differ from their nautical assessors on a question of navigation. In the present case, thinking as they do that the risk of collision was not determined when the *Arratoon Apcar* ported the second time, they see no reason for not giving effect to the advice which they have received. They are therefore obliged to hold that the *Arratoon Apcar* was to blame for not slackening speed in good time before the third appearance of the *Hebe's* green light.

The error on the part of the *Arratoon Apcar* may seem venial compared with the misconduct of those on board the *Hebe*. But their Lordships have no power to absolve a vessel which infringes the regulations for preventing collisions at sea from the consequences prescribed by statute unless a plea of necessity is made out.

The view which their Lordships have taken under skilled advice renders it unnecessary to pronounce an opinion on the conduct of the officer in charge of the *Arratoon Apcar* after the *Hebe's* green light appeared the third time. It was probably too late then to prevent a collision. Their Lordships however think it right to say that they are not satisfied that the excuse for not reversing ought to have been accepted as sufficient, nor are they convinced that the officer in charge of the *Arratoon Apcar*, after he saw the danger was justified in going to the wheel before giving orders to stop. Though the time lost was short there was an appreciable delay in complying with the regulations.

In the result their Lordships will humbly advise Her Majesty that the decree under appeal ought to be varied by pronouncing the *Arratoon Apcar* to blame as well as the *Hebe* with the usual consequences, including a direction to assess the damages sustained by the *Hebe*, and by discharging the order as to costs.

There will be no costs of the appeal.

Solicitors for appellants: *Pritchard & Sons.*

Solicitor for respondents: *Hollams, Sons, Coward, & Hawkesley.*

[PRIVY COUNCIL.]

J. C.* 1889 Nov. 14.

WOOLCOTT AND ANOTHER . . . . . PLAINTIFFS;

AND

PEGGIE . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Vendor and Purchaser—Condition of defeasance—Right to rescind.

In an action by purchasers for specific performance of a contract for the sale of some real property which contained a proviso to the effect that the vendor might annul the sale on his being unwilling or unable to remove any objection to title, it appeared that the purchasers conditionally offered to give time for the removal of their objection and that the vendor in good faith objected to the conditions, and was threatened with litigation in consequence :—

Held, that the vendor was entitled to rescind.

APPEAL from a judgment of the Full Court (July 24, 1888), affirming a judgment of Webb, J. (April 13, 1888).

The facts are stated in the judgment of their Lordships.

Finlay, Q.C., and *G. Lawrence*, for the appellants, cited *Bowman* v. *Hyland* (1).

Sir *Horace Davey*, Q.C., and *Methold*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN :—

This is a purchasers' action for specific performance of a contract for the sale of some real property. The defence was that before the action was brought the contract had been annulled by the vendor under a condition in the contract. There was a

* *Present* :—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

(1) 8 Ch. D. 588.

counter-claim, the result of which necessarily depended on the result of the action.

The condition on which the vendor relied, provided that in case the purchaser should, within the time limited, make any objection to, or requisition on, the title which the vendor should be unable or unwilling to remove, it should be lawful for him to annul the sale.

The requisition which led to the question between the parties was in substance this: The purchasers called the attention of the vendor to the fact that on the registry there appeared to be the entry of a previous contract by him for the sale of the very same property to a Mr. Taylor, and they required that this entry should be removed. After some little delay which is fully accounted for by the circumstances of the case, the vendor stated, apparently with perfect truth, that he had never heard of the entry before the purchasers brought it to his notice; and he asserted, and apparently with equal truth, that he had never entered into such a contract as that referred to in the entry. The vendor at once set about getting the entry removed. He commenced proceedings against the person who had improperly procured the entry to be made, but as that person had left the Colony, he found that it was impossible to bring the matter to a speedy issue. All this was communicated to the purchasers, and they were asked what course they proposed to take. They were willing to give time if the vendor would give an indemnity, but otherwise they insisted on the entry being removed according to the requisition, that is, removed forthwith, or at any rate before the vendor was to be at liberty to deal with any part of the purchase-money. The vendor was unwilling to give the required indemnity, and unable to remove the entry forthwith. At last, on the 2nd of September, 1887, one of the purchasers, who was a solicitor, and had the conduct of the matter, wrote as follows: "With regard to Mr. Taylor's claim, I will, as already stated, give you any reasonable time to clear this away. Unless you accept my offer which is in terms of your letters and the contract, on or before Monday next, I shall take such action as I may be advised to enforce the same." That was in distinct language, threatening the vendor with litigation unless he

J. C. 1889 WOOLCOTT v. PEGGIE.

accepted the purchaser's offer. Their offer was an offer to give time on condition, but only on condition that he gave an indemnity. The vendor intimated that he should be obliged to annul the sale. The purchasers still insisted on what they considered to be their strict rights. Under these circumstances the vendor gave notice that he rescinded the contract. Their Lordships agree with the Courts below that he was justified in so doing.

Whether his action is to be regarded as founded upon inability to remove the objection in accordance with the exigency of the requisition, or on unwillingness to proceed further on the footing of a subsisting contract, in face of the consequences with which he was threatened (which seems the more natural view) is wholly immaterial. In either case, he was entitled to rescind the contract, provided he acted in good faith.

Their Lordships therefore will humbly advise Her Majesty to dismiss the appeal, and the appellants will pay the costs.

Solicitors for the appellants: *Wadeson & Malleson.*
Solicitor for the respondent: *J. G. Kempster.*

[PRIVY COUNCIL.]

J. C.* 1889 *Nov.* 8, 13; *Dec.* 11.

ALISON AND OTHERS . . . . . PLAINTIFFS;
AND
BURNS . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Crown Lands Act of 1884—*Appraisement by Local Land Board—Power of Minister for Lands.*

Held, that under the New South Wales Crown Lands Act of 1884, the minister for lands has not the power to determine that either the yearly rental or yearly licence fee in respect of the leasehold and resumed areas of a pastoral holding shall be at a higher rate than that appraised by the Local Land Board in the mode provided by the Act. If the minister dissents from such appraisement he can remit the same to the Local Land Board for revision.

APPEAL from a judgment of the Supreme Court (Aug. 15, 1888), upon a special case stated by consent under 17 Vict. No. 21,

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

s. 42, in an action by the appellants against the respondent sued as nominal defendant on behalf of the Government of the Colony.

The question raised in the appeal was whether under the circumstances stated in the special case which is set out in the judgment below, the minister for lands had power to determine as he did the rent or licence fee payable by the appellants. Its answer depended upon the interpretation of certain sections of the Crown Lands Act, 1884 (48 Vict. No. 18).

Rigby, Q.C., and *Ingle Joyce* (*W. R. Griffiths* with them), for the appellants, contended that under the Act of 1884 the minister for lands was not empowered to act as he did. Without remitting the matter to the Local Land Board or giving all parties an opportunity of being heard, he could not determine the rent payable in respect of leasehold areas, or the licence fee payable in respect of resumed areas at a higher rate than that appraised by the Local Land Board. The licence fee payable for the first year of an occupation licence is an appraised licence fee approved by the minister, and not a licence fee determined by the minister irrespective of the appraisement. The licence fee for any year of occupation is payable on the basis of an appraisement by the Local Land Board, and it cannot be arbitrarily fixed by the minister. Reference was made to *Butler* v. *Parsons* (1); *Atkinson* v. *Fell* (2).

Sir *Horace Davey*, Q.C., and *Leverson*, for the respondent, submitted that the judgment of the Court below was right. The rental and licence fee payable by the appellants were lawfully and properly determined by the minister. Under sect. 78, sub-sect. 2, and sect. 81 of the Act of 1884, the minister was empowered to do as he had done. He could thereunder lawfully determine the rental and licence fee at a rate higher than that appraised by the Local Land Board. He could do so without either remitting the matter to the board or hearing the appellants.

Joyce replied.

(1) 9 New S. Wales L. R. 448. (2) 5 M. & S. 240.

J. C. 1889 ALISON v. BURNS.

Dec. 11. The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

An action was brought in the Supreme Court of New South Wales against the Colonial Treasurer, as nominal defendant sued for and on behalf of the Government of the Colony, to recover certain moneys paid by the plaintiffs under protest to Her Majesty the Queen, in which action a special case was stated by consent and pursuant to an order of a Judge of the Court. The case stated as follows:—

"The plaintiffs are the lessees of the leasehold area of the Canonbar pastoral holding situate in the Central Division of the said Colony, and are also the occupation licensees of the resumed area of the said holding. The said holding was, pursuant to the provisions of the 71st section of the Crown Lands Act of 1884, by notification of the Government Gazette of the 11th of July, 1885, divided into the said leasehold area and resumed area.

"The Local Land Board for the land district within which the said pastoral holding is situate, after hearing evidence, appraised the yearly rental of the said leasehold area at the sum of 1½*d.* per acre, and they also appraised the yearly licence fee of the said resumed area at the sum of £2 per section.

"The total annual payments thus appraised by the said Local Land Board amounted to £1,928 7*s.* 6*d.* for the said leasehold area, and £921 11*s.* 8*d.* for the said resumed area.

"The amount of arrears due in respect of the said resumed area on the appraisement of the said Local Land Board amounted to the sum of £1,380 7*s.* 2*d.*

"The said appraisements were conducted under and in accordance with the provisions of the Act 48 Vict. No. 18, as required by sects. 78 and 81 respectively. Copies of the said appraisements are annexed hereto, and are marked 'A' and 'B' respectively. The chairman of the said Local Land Board dissented from the other members of the said board in respect of the said appraisements.

"The said appraisement and the evidence taken in writing before the said board were duly transmitted to the minister for lands of the said Colony, and, after consideration of the same by

the said minister, he determined the yearly rental of the said leasehold area at the rate of 2*d.* per acre, and the yearly licence fee of the said resumed area at the rate of £2 13*s.* 4*d.* per section.

"It is admitted for the purposes of this case, but subject to the opinion of this honourable Court on the question hereinafter submitted as to the power of the said minister for lands, that the said minister, in so determining the said rental and licence fee, duly acted as such minister as aforesaid under the powers and authorities vested in him by the said Act 48 Vict. No. 18.

"After the determination of the said rental and licence fee as aforesaid, notice thereof was duly published in the Goverment Gazette of the 12th of September, 1887, as provided for by the said Act. No notice of the said determination of the said rental and licence fee, or either of them, was given to the plaintiffs other than the said publication in the said gazette.

"The total annual sums thus determined by the said minister for lands amounted to £2,571 3*s.* 4*d.* for the said leasehold area, and £1,228 15*s.* 6*d.* for the said resumed area.

"The said minister likewise determined the amount of the said arrears at the sum of £1,840 19*s.* 6*d.*, being the amount duly calculated on the licence fee so determined as aforesaid.

"The plaintiffs have paid to the said Government for the rent of the said leasehold area the full sum of £2,571 3*s.* 4*d.*, but under protest as to £642 15*s.* 10*d.*, part of the said sum, being the difference between the amount so appraised by the said Local Land Board and that so determined by the said minister for lands as aforesaid.

"The plaintiffs have also paid to the said Government for the licence fee of the said resumed area the full sum of £3,069 5*s.*, but under protest as to £767 6*s.* 2*d.*, part of the said sum, being the difference between the amount so appraised by the said Local Land Board and that so determined by the said minister for lands as aforesaid.

"It is contended on behalf of the plaintiffs that the said minister could not under the circumstances hereinbefore set forth, and without either remitting the matter to the Local Land Board or giving the plaintiffs an opportunity of being heard,

J. C. 1889 ALISON v. BURNS.

lawfully determine the said rental or licence fee at a higher rate than that appraised by the said Local Land Board.

"On the other hand, it is contended by the defendant that the said minister had such power under the said Act.

"The question for the opinion of the Court is, whether the said minister had power so to determine the said rental or licence fee under the circumstances hereinbefore set forth.

"If the Court shall be of opinion in the negative upon the said question as to the said rental and licence fee, or either of them, judgments shall be entered for the plaintiffs for the said sums of £642 15*s.* 10*d.* and £767 6*s.* 2*d.*, or either of them, as the Court shall direct, with interest thereon from the 11th day of November, 1887 (should the Court think that the plaintiffs are entitled to interest), with costs of suit.

"If the Court shall be of opinion in the affirmative upon the said question, both as to the said rental and the said licence fee, judgment shall be entered for the Defendant, with costs of suit.

"Either party is to be at liberty to appeal to Her Majesty in Her Majesty's Privy Council, if so advised."

The Supreme Court was of opinion that the minister had, both in respect of the rent and the occupation licence fee, power to act as he did in this case when he raised both the above amounts recommended by the Land Board, and ordered judgment to be entered for the defendant.

Sects. 78 and 81 of the Crown Lands Act of 1884 are in a group of sections relating to the division of runs or pastoral holdings, of which sect. 71 directs that every runholder shall, within 120 days after the commencement of the Act, lodge with the minister a written application for a pastoral lease in the prescribed form of whichever portion of his run may be converted into a leasehold area under this part of the Act; and with the application he is to furnish a plan of his pastoral holding shewing, with other matters, all improvements made upon it by him, or of which he claims to be the owner. The runholder is not in the same position as a stranger applying for a lease, and this is material in considering the intention of the provision for fixing the rent. Sect. 78 enacts that the Governor may grant pastoral

leases of leasehold areas subject to the provisions following, of which the second is: "The rent shall, in all cases, commence from the date of the notification of the division of the pastoral holding, and be determined by the minister after appraisement by the Local Board, which shall conduct all appraisements in the prescribed manner." Sect. 81 relates to occupation licences. The Supreme Court say they "see no reason for supposing that the Legislature intended to give the minister less power in determining, after informing himself by appraisement, what the occupation license fee should be, than in determining what the rent of the leasehold area should be after informing himself in the same way." Their lordships agree in this, and they also see no reason for supposing it was intended to give the minister more power in determining what the rent of the leasehold area should be than in determining what the occupation licence fee should be. They think the intention is the same in both cases. Sect. 81 is not in the same terms as 78, but it may throw light upon that section. The words are:—

"The runholder shall be entitled to an occupation license of the resumed area if he shall have applied for such license at the time of his making his application for a pastoral lease, and shall have deposited with the Colonial Treasurer a sum equal to two pounds per section of six hundred and forty acres of the estimated area on account of the first year's license fee, and upon approval by the minister he shall pay the difference between the sum paid into the treasury and the license fee appraised as hereinafter provided, and during the currency of such license shall pay such annual license fee per section as aforesaid as shall be determined by the minister after appraisement by the Local Land Board. Provided that the minister may at any time direct a fresh appraisement to be made, and may require the licensee to pay his annual license fee on the basis of such fresh appraisement after the expiration of any current year during the continuance of the license."

Their lordships do not agree with the Supreme Court that this section should be read, "and shall pay the difference between the sum paid into the treasury and the license fee determined by the minister after appraisement by the Local Land Board as

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hereinafter provided," instead of "appraised as hereinafter provided." The words of the section appear to be intended to give to the appraisement a greater effect than an information or recommendation to the minister of what the rent should be, which is the view the Supreme Court has taken of both sections.

Sect. 49, as to conditional leases of adjoining land which may be granted to conditional purchasers of land, says: "The annual rent to be paid for land conditionally leased shall be such sum not less than twopence per acre as the Local Land Board, subject to the approval of the minister, shall determine as the fair rental thereof." These words cannot be construed as giving to the minister the power which he has exercised in this case, and there is no apparent reason for his having, in the case of a pastoral ease, a greater power than in the case of one of these conditional leases.

It is necessary to refer to the sections of the Act which relate to the Local Land Board and its powers and duties to see what is intended by the appraisement. But before doing this, it may be useful to notice the previous legislation regarding crown lands. The Crown Lands Occupation Act of 1861 (25 Vict. No. 2), in the 23rd section provided that, in cases where it was necessary or desirable to fix or ascertain any rent by appraisement, the minister or any officer authorized by him and the claimant might concur in the appointment of a single appraiser, or, failing that, each party should appoint an appraiser, and the award of any appraiser or appraisers was to be binding, final, and conclusive upon all parties to the appraisement for all intents and purposes. By the amending Act of 1880 (43 Vict. No. 29), it was enacted that the appraisement should be made by one or more appraisers appointed by the minister charged with such appraisement, and every appraisement so made should, unless altered or vetoed by the minister after the receipt of a report and recommendation from three such appraisers, be binding, final, and conclusive. These Acts were repealed by the Act of 1884. By it it was enacted (sect. 11) that there shall be a Local Land Board for every land district or for several land districts, the members of which are not to exceed three in number, and to be appointed by the

Governor. Sect. 14 regulates the procedure of the board. It is to have power to hear and determine all complaints and other matters brought before it, and to conduct all inquiries sitting as in open court, and take evidence on oath. Every party is to have a right to be heard by counsel, attorney, or agent, and the decision is to be given in open court. By sub-sect. 6 the minister may return to the Local Land Board for revision, re-hearing, or further consideration any case or matter which shall appear to him to have been improperly or insufficiently considered or determined by the board. The minister might under this have returned the appraisement to the board for revision. The giving him this power appears to shew that the board was intended to have more than a mere power of recommending to the minister what the rent should be.

After an examination and consideration of the various sections of the Act, and the previous legislation, their Lordships are unable to agree with the learned Judges of the Supreme Court that "the policy of the Act seems, in all cases between the crown and its tenants where rent or the amount of compensation to be paid to crown tenants is concerned, to place the minister in the position of a landlord, with supreme power to fix the rent which the crown tenant is to pay, limited only by ministerial responsibility to Parliament." It seems to them to be the policy and intention of the Act that the Local Land Board and the minister should concur in fixing a fair rent for the occupation of crown lands by persons who are recognized by the Act as having a preferential claim to occupy them. In their Lordships' opinion, the minister had not power to act as he did in the case of either the rent or the licence fee, and judgment ought to be entered for the plaintiffs for both the sums mentioned in the case, with interest at 5 per cent., and costs. They will therefore humbly advise Her Majesty to allow the appeal and reverse the judgment of the Supreme Court, and order judgment to be entered for the plaintiffs accordingly. The respondent will pay the costs of the appeal.

Solicitor for appellants: *G. P. Slade.*
Solicitor for respondent: *R. C. Want.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1890 *Feb.* 17.

MRS. CATHERINE MUNRO WARRAND AND OTHERS . . . . . } APPELLANTS;

AND

ANGUS MACKINTOSH OF HOLME . . RESPONDENT.

Salmon Fishery—Royal Charter—Competing Grants—Possession—Rod Fishing.

The appellants were the proprietors of salmon fishings derived from the town of Inverness. They produced a Crown charter, dated 1591, purporting to be a renewal grant confirming to the town of Inverness "all and whole the waters of Ness, with all the salmon fishings thereof from the stone 'C.' to the sea." Admittedly this grant did not include two fishings within those limits which had existed from a very early period under different grants.

The respondent was the proprietor of the land "H.," which bordered one side of the river Ness, and is situated nearly equally above and below "C." He possessed one-half of "H." under a Crown charter of confirmation on resignation, dated 1566, granting "Half the lands of 'H.,' with the salmon fishings pertaining to the same, on the water of Ness," with an infeftment taken in 1706, which ran, "Half the lands of 'H.,' and half the fishings." He held the other half of "H." under a grant which contained no mention of fishings. He and his predecessors had always enjoyed without question the salmon fishings opposite that part of "H." lying above "C." There was no exact description of the two halves of "H." The appellants claimed to have the exclusive right to the fishing below "C.," as against the respondent.

Held, reversing the decision of the Court of Session (15 Court Sess. Cas. 4th Series, 833), that there was no contradiction between the two titles, and that the appellants were entitled to the exclusive enjoyment below "C.," as against the respondent; his possession of the fishings *above* "C." fully satisfying his title.

APPEAL against a judgment of the Second Division of the Court of Session (Lord Rutherfurd Clark dissenting) (1), recalling an interlocutor of the Lord Ordinary (Lord McLaren) in an action of declarator and interdict at the instance of the appellants, Mrs. Catherine Munro Warrand of Bught, her

(1) 15 Court Sess. Cas. 4th Series, 833.

marriage contract trustees, and the magistrates of Inverness, against the respondent Angus Mackintosh of Holme, and Charles Innes, Solicitor, Inverness (1).

The facts and evidence are fully set out in the judgments of Lords Herschell and Watson.

1889. Dec. 2, 3, 5. *The Lord Advocate* (*J. P. B. Robertson*, Q.C.), and Sir *Horace Davey*, Q.C. (with them *C. N. Johnston*, of the Scotch Bar), for the appellants.

The respondent is not even entitled to a joint right with the appellants in the water in question. The appellants' title is an express grant of the whole fishings by proper descriptive words, and denotes an exclusive right. It is admitted the Friar and Gordon fishings are within the geographical limit of the appellants' title, but they stand on ancient and separate titles. Salmon fishings are not pertinents of land; they are separatum tenementum, and possession may be decisive of the locality of the fishings. The respondent holds no other title to salmon fishing than half the fishings of the lands of Holme, and the fishings which he enjoys under that grant are clearly identified by possession and use as being the fishings *above* the stone Clachnahagaig. His titles are, therefore, satisfied, and the construction making these two Crown charters inconsistent is avoided. It may be that the boundaries of the Holme estate are not the same now as in 1566, for from 1680 to 1769 the land, now undoubtedly Holme estate, adjacent to the disputed waters was claimed by the town of Inverness as part of the town moor, and according to an old map of 1774 the Holme estate did not extend below a line drawn at the stone Clachnahagaig. The marriage contracts of 1748 and 1780 contained no reliable indication of boundaries of the two halves of Holme, and in respect to the dispute with the town the proprietors had an obvious interest in seeking to identify the two halves. The action in 1775 between

(1) The town fishing was known as the "four-coble" fishings. The appellants, Mrs. Warrand's marriage contract trustees, are proprietors of three two-sixths cobles, the magistrates of Inverness three-sixths cobles, and the remaining one-sixth coble belongs to the defender, Mr. Innes, who is also a fishing tenant of the respondent.

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the *Magistrates of Inverness and Duff of Muirtown and Others* (1), heritors of the town fishings, shewed the rights then established in the town were the same as now claimed by the appellants.

The evidence was all one way, that the Holme proprietors only fished above the stone Clachnahagaig, and the town tenants below; and that the appellants and their predecessors' possession was full and exclusive, and such as would be expected from one with such a title. It lies on the respondent to make out which and where were his fishings.

The Dean of Faculty (*J. B. Balfour*, Q.C.), and the *Solicitor-General for Scotland* (*Darling*, Q.C.), for the respondent:—

The appellants fail in their contention unless they establish an exclusive right. Their title is a document of extraordinary amplitude, like many old burgh documents, which contained some grants which the Crown had no right to make, and they certainly have not the whole fishings from the stone to the sea, because there are the Friar and Gordon fishings lying between these points, which fishings were in 1591 held separately, although they were not reserved out of the general gift to the town. The designation of the town fishings as the "Four Cobles" fishings is also not very favourable to a universal right. And the case (1) in 1775 shews that before cruives in the river were abolished the "Four Cobles" fishings contained the town's whole right. These facts cannot raise the presumption that the disputed fishings were not possessed at the date of the town charter by Lord Moray, the respondent's predecessor.

The respondent's Moray grant was not half the Holme fishings, but half of the Ness fishings from bank to bank, ex adverso the whole Holme estate. The effect of a grant of land with the salmon fishings of those lands is primâ facie a grant of the fishings ex adverso of those lands: Lord Cairns in *Stuart* v. *M'Barnet* (2). The other lands of Holme, held under the Calder or Balnain title, may not have had any river frontage, or Lord Moray may have had all the Holme fishings. That would explain why the Calder portion was given without fishings.

(1) Mor. 14257.

(2) 6 Court Sess. Cas. 3rd Series, H. L. at p. 128; 1 L. R., Sc. 387.

Secondly, if the construction put on the respondent's title is that it means half the land and half the fishings, then, unless he is put out by the exclusive possession of some one else, the legal presumption is, that the half must be taken to be ex adverso of Lord Moray's land; and it is contended that Lord Moray's land forms the lower portion of the lands of Holme, and lies opposite the disputed waters. That is shewn by the marriage contracts of 1748 and 1780. The appellants were wrong in saying this land was town moor; it was anciently Holme land under moss. Again, the respondent has localised the fishings, and it falls on some one else to shew where, if not there, were these fishings.

In this reading the respondent may have yet to contend with some one else for the upper fishings, and therefore it is not legitimate to examine his right to these; but if his first contention, that he got the half of the fishings of the whole river, is correct, then there can be no future question as to the fishings opposite the upper half.

The third view, which was the conclusion adopted by the Court of Session, was that the respondent had not got a frontage right but that a joint right had been proved by possession under the respective titles. A grant of fishing may be extended to other lands: *Stuart* v. *M'Barnet* (1); and what are the fishings of A. may be ascertained by evidence of possession. The respondent's rod fishing has been continuous and also exclusive; the latter he does not require, as he does not want to prescribe the fishing. In the old cases it was said that rod fishing was not to be counted. But if it should appear that rod fishing is the best and most lucrative method of fishing, it would be difficult to say that a proprietor possessing by rod fishing was not exercising the right of salmon fishing. See *Stuart* v. *M'Barnet* (1); *Duke of Richmond* v. *Earl of Seafield* (2). There is a difference between the possession necessary to convert a right to fishings merely into a right to salmon fishings, and that possession which is required to define the limits, as here, of an express grant. In the former

(1) 5 Court Sess. Cas. 3rd Series, 753; on appeal, 6 Court Sess. Cas. 3rd Series, H. L. 123; and 1 L. R., Sc. 387.

(2) 8 Court Sess. Cas. 3rd Series, 530.

H. L. (Sc.) 1890 WARRAND v. MACKINTOSH.

case it must be the most complete and exclusive possession; in the latter no more is required than actual possession sufficient to assert the right.

Here, until the cruives were taken off in 1823, it was not worth anybody's while to keep a boat, except those who had the cruives. After that, the respondent kept a boat, and let the fishing for angling.

The evidence proves the respondent's joint use of these lower fishings.

[They also cited *Earl of Zetland* v. *Tennent's Trustees* (1).]

The Lord Advocate replied.

Judgment after consideration.

1890. Feb. 17. LORD HERSCHELL:—

My Lords, the pursuers sought to have it declared that they and the defender, Charles Innes, had the sole and exclusive right of salmon fishing in the River Ness from both banks—from the stone of Clachnahagaig to the mouth of the river, where it joins the sea at low water, with the exception of two fishings known as the Duke of Gordon's fishing and the Friar's fishing, and that the defender Mackintosh had no right to fish for salmon upon the river within the bounds aforesaid. The Lord Ordinary found that the pursuers were entitled as deriving right from the magistrates of Inverness to the salmon fishings concluded for, and therefore found and declared in terms of the conclusion of the summons. In the Inner House the Lord Justice Clerk and Lord Young (Lord Rutherfurd Clark dissenting), differing from the view taken by the Lord Ordinary, recalled the interlocutor and assoilzied the defender.

The appellants maintain that they, along with the defender Charles Innes, who has a small pro indiviso interest with them in the fishings, have the sole right of salmon fishing from both banks of the river within the waters in question. The title of the appellants and the defender Innes is derived from the burgh

(1) 11 Court Sess. Cas. 3rd Series, 469.

of Inverness. It is not disputed that if the burgh possessed the right for which the appellants contend, that right is now vested in them and the defender Innes, and their claim is well founded. The respondent does not assert any right to fish from the left bank of the river; his claim is limited to fishing from the right bank, where the river is ex adverso of lands which are undoubtedly his property. The Inner House have not sustained a claim on his part to the exclusive right to fish from the right bank, but have held that he is entitled to do so jointly with the appellants.

The appellants place their main reliance upon a charter of King James VI., dated the 1st of January, 1591. By this charter there was granted and confirmed to the burgh "totamque et integram aquam de Ness omnesque partes, ac utrumque latus ejusdem, inter lapidem vocat. Clachnachaggag et mare, cum omnibus piscationibus et piscariis, tam salmonum quam aliorum piscium." It is not disputed, and indeed could not be, that this charter in terms covered the whole of the salmon fishings in question, and purported to vest them in the burgh. But the respondent alleges that by a charter of Henry and Mary of earlier date, viz., the 1st of June, 1566 (which was a charter of confirmation on resignation), the fishing in question from the right bank of the river was, together with the lands of Holme, granted and confirmed to the Earl of Moray, a predecessor in title of the respondent. He asserts that there are thus competing titles, of which his is the earlier in date, that the use must therefore be looked to, and that when the evidence on this point is properly weighed it establishes his case and shews that his claim is well founded. The words of the charter upon which he relies are as follows:—"Dimidietatem terrarum de Holme, cum salmonum et aliis piscariis earundem in aquâ de Nyss." The earliest instrument of title containing a description of the lands derived from the Earl of Moray is a precept of clare constat, dated the 4th of September, 1706, by the Earl of Moray, in favour of John Mackintosh, in which the lands and tenements held by him of the Earl are thus described: "Toto et integro dimidio villæ et terrarum de Holme, et in dimidio molendini de Holme astrictis multuris et sequelis ejusdem cum dimidio

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salmonum piscarium supra aqua de Ness ad dict. terras spectantibus domibus edificiis, etc."

It will be observed that he thus shews title to one-half only of the lands of Holme, but it is common ground that he is the owner of the whole of these lands. The other half is held under a different title of the Laird of Calder (now of Fraser of Balnain). In a precept of clare constat, dated the 25th of March, 1700, in favour of John Mackintosh, the lands are thus described: "Toto et integro dimidio villæ et terrarum de Holme, et dimidio molendini earundem, cum astrictis multuris ad dict. terrarum partibus pendiculis domibus hortis ædificiis cæterisque suis pertinentiis quibuscumque solitis et consuetis." There is in this instrument no mention of any fishery. The respondent relied on the evidence afforded by the description contained in certain marriage contracts for the purpose of shewing that the part of the river, the salmon fishing in which is in dispute, was ex adverso that portion of the lands of Holme which he derived from the Earl of Moray, and not that portion which he held under the title of the Laird of Calder. And it is in this way that he seeks to establish that the titles to the fishings in question are competing titles. Now it may be admitted that a grant of lands, with the fishings pertaining thereto, does primâ facie mean the fishings ex adverso of them. But this is only the primâ facie, and not the necessary construction—that is to say, it is the construction to be put upon the grant, if there be nothing to lead to the conclusion that some other construction ought to be adopted. But I think that in the present case there are strong grounds for rejecting the primâ facie interpretation, if any other reasonable one be possible. It is not to be presumed that the Crown would grant the same subject-matter to different persons by conflicting dispositions. The grant to the burgh is unambiguous, and susceptible of but one interpretation. And this is, I think, of itself enough to shew that the other title ought, if possible, to receive a construction which will make it applicable to some other subject. Indeed, it appears to me doubtful whether such titles as these can properly be termed competing titles, for each may have due effect given to it, doing no violence to its language, without any conflict resulting. In the present

case it is, to my mind, clear that the respondent has title to one half only of the salmon fishings of the lands of Holme, in the river Ness. And the evidence shews that he has long enjoyed, and still enjoys without question, the salmon fishings ex adverso one-half of the lands of Holme which border on the river.

It is argued on his behalf that the Court is not justified in investigating his title to those fishings which are not in dispute, or in inquiring by what right he enjoys them. I cannot concur in this view. The title under which he claims the fishings in dispute is a grant of one half of the lands of Holme, with one half of the fishings pertaining to those lands. And in construing this grant I think we are clearly entitled to ask, What were the lands of Holme, and what salmon fishings have been enjoyed with them? And it appears to me that the fishings ex adverso the lands of Holme, to which he has undisputed right, amply satisfy the terms of the title, and that there is no necessity for resorting to a construction of the grant which would conflict with the clear and unequivocal terms of the grant to the burgh. It is urged on behalf of the respondent that it is improbable that the fishings opposite lands not comprised in the grants to and from the Earl of Moray would be included in such grants. I may observe that if the plan No. 236 (1) of process could be relied on, the whole of the fishings, both those enjoyed without dispute and those which are now in controversy, are ex adverso lands held under the Moray title. But there does not appear to be any satisfactory proof of this. And, assuming it not to be so, the point does not, in my opinion, involve any difficulty. It is conceded that a fishery is separatum tenementum, which may be held, and is not unfrequently held, apart from the ownership of the adjacent land. This seems to me to be a sufficient answer to the suggested difficulty. Then it is contended that the true meaning of the grant of "one half of" the salmon fishings belonging to the lands of Holme is that it confers the right in that half of the river from bank to bank which is next the lands

(1) A plan was prepared by Mr. Innes for the respondent which shewed the whole river frontage as belonging to that half of Holme held of the Lord Moray. The appellants alleged there was no evidence to warrant shewing on a plan the two halves of the estate as they originally existed.

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of Holme. Without saying that such a construction would never be proper, I do not think it is the natural or legitimate one in the case of the grant we are dealing with, where the words are such as we find there, and immediately follow a grant of one half of the lands of Holme, and where such a construction would conflict with another title.

I have arrived, then, with the Lord Ordinary, at the conclusion that, if the titles alone be considered, without reference to the oral evidence relating to the fishings in dispute, the claim set up by the pursuers is established. And I find nothing in the oral evidence which militates against this conclusion.

In the year 1843 the respondent, who was then a minor, filed a petition before the Sheriff of Inverness, alleging a right to the salmon fishing opposite the lands of Holme, and that the then respondent, Archibald Tait, had fished for salmon on the Holme side of the river, and drawn his nets on to these lands, and praying an interdict to prohibit Tait from encroaching on the petitioner's right of salmon fishing by fishing on the Holme side of the river. On this petition the sheriff-substitute granted an interim interdict. A considerable body of evidence was led for the respondent in these proceedings, but no evidence was led for the petitioner. How this came about does not, to my mind, very clearly appear. But I lay no stress upon the circumstance. It is sufficient to say that the interdict remained in force, and the matter lay dormant for several years, until, under a process of wakening, the interlocutor was in the year 1853 recalled. The circumstances under which this took place are not before your Lordships. The proceedings in the sheriff's court are only of importance in two respects. The evidence there led was used by the appellants as evidence in the present suit, and the existence of the interdict renders the user proved between 1843 and 1852 of little or no importance. There is another circumstance which diminishes the importance of the evidence relating to the earlier part of the time covered by the evidence. It appears that cruives then existed in the lower reach of the river, which were made so as to prevent all fish above seven or eight pounds in weight getting through them. And it would seem that it was only after floods that fishing with coble and net took place in the river

where the fishings are in dispute. That the appellants' predecessors in title did fish there as far back as 1804 appears certain, and that they hauled the net in indiscriminately on both sides of the river. I need not dwell upon this, however, since it appears to have been conceded in the Inner House that the only question was whether the respondent Mackintosh had a concurrent right of fishing in these waters, and that he had such right is all that the majority of the Court have decided in his favour. On this point evidence of great importance was given by John McNaughton, one of the witnesses examined in 1843. He took, in 1816, a lease of the Holme fishings for one year from Angus Mackintosh, a predecessor of the respondent, at a rent of £10, and, according to his statement, "When the deponent took the fishings Angus Mackintosh pointed out the march to him—that is, the march between the town's fishings and the Holme fishings. He told him that the place so pointed out was the march, and that he (Mackintosh) could not give the deponent permission to go farther down the river, and that the deponent could not fish farther down, unless he had permission from those who had the fishings below." The march the witness identified as the stone of Clachnahullig (or Clochnahogig), on the north side of the river, nearly opposite the cottage, and the fir trees on the south side. It was attempted to diminish the force of this evidence by the production of an entry of the 23rd of July, 1816, in the books of Angus Mackintosh, whereby he acknowledged the receipt from Mr. McNaughton "for liberty to fish in part, £5"—the suggestion being that McNaughton did not enjoy the whole of the Holme fishings. But I think it is obvious that the words "in part" meant merely that the £5 was in part payment, and not in full discharge, the agreed rent being £10.

There is scarcely any evidence of fishing by the respondent, or those claiming title under him in the disputed waters prior to the date of the interdict, except that Dr. Nichol, who resided at Holme Mills, was seen fishing there. After the recall of the interdict, such fishing as there was appears to have been by rod and line. Before that date a coble was occasionally used. I do not lay any stress upon the fact that the user was by rod and

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line only, because it appears to me to have been occasional only and very limited in amount, and far from sufficient to shew that the respondent or his predecessors have been in point of fact in possession of the fishings now claimed, or to countervail or displace the title which the appellants establish under the charter to the burgh to all the salmon fishings in that part of the river Ness in respect of which the present controversy has arisen. I am not unmindful of the fact that the right to fish in the disputed waters was included in several leases of the Holme fishings. But the right thus granted not having been exercised, or very rarely so, I cannot attach any importance to the mere granting of the leases.

Upon the whole, I think that the appellants have made out their case, and that the interlocutor appealed from must be reversed, and the interlocutor of the Lord Ordinary restored. The respondent must pay the costs here, and in the Court below.

LORD WATSON:—

My Lords, the respondent and his ancestors have, for nearly three centuries, been proprietors of the estate of Holme, lying on the east side of the river Ness, which has a northerly course from Loch Ness to the sea. These lands commence at a point on the river side near to Ness Cottage, and thence extend up the river for about two miles, to a point where they march with Lord Saltoun's property on the south. About midway between these two points, there was, in olden times, a large stone visible on the west side of the river, which went by the name of Clachnahagaig. It stood at some distance from the water, and is now buried in the embankment of the Caledonian Canal. There is no question raised in this case with respect to the salmon fishings opposite to that portion of the estate which lies to the south of Clachnahagaig, but the appellants and the respondent each claim exclusive right to the salmon fishing ex adverso of the lands of Holme between Clachnahagaig and their northern boundary, the respondent claiming alternatively a right in common with the appellants.

The estate of Holme was acquired in two halves, the one from

the Earl of Moray, with salmon fishings, and the other, to which no right of fishing is attached, from the Laird of Calder, now of Balnain. The only Moray title produced is a Crown charter in favour of Earl James and his spouse Agnes Keith and the survivor of them, dated the 1st of June, 1566, of the entire comitatus of Moray, containing amongst other subjects enumerated, "dimidietatem terrarum de Holme, cum salmonum et aliis piscariis earundem in aquâ de Nyss." In the year 1618, Angus Mackintosh, rector of Kingussie, was infeft in the entire estate, "tam de Moravie Comite quam de domino de Calder tenet." The earliest description of the Calder half of the estate occurs in a sasine of 1700, in favour of John Mackintosh of Holme, in these terms, "toto et integro dimidio villæ et terrarum de Holme, et in dimidio molendini earundem." The earliest description of the other half, after it came into the possession of the Mackintosh family, is to be found in a precept of clare constat by the then Earl of Moray, dated the 4th of September, 1706, in favour of the same proprietor, which is in these terms: "Toto et integro dimidio villæ et terrarum de Holme, et in dimidio molendini de Holme astrictis multuris et sequelis ejusdem cum dimidio salmonum piscarium supra aqua de Ness ad dictas terras spectant[s]."

The appellants derive their title from the burgh of Inverness, whose earliest charter extant is from King James VI., and bears date the 1st of January, 1591. It does not profess to make any new grant, but simply purports to ratify and confirm all estates, rights, and privileges already granted to the burgh by the predecessors of His Majesty, including "totamque et integram aquam de Ness, omnesque partes, et utrumque latus ejusdem, inter lapidem vocat. Clachnachaggag et mare, cum omnibus piscationibus et piscariis, tam salmonum quam aliorum piscium." The charter confers right to fish with net and coble, and also to maintain and repair cruives according to use and wont. The burgh feued out its fishings, in half and quarter cobles, to the extent in all of four cobles; and in a question with the feuars, the Court of Session decided (1) in the year 1775 that the whole interest of the burgh in the salmon fishings between Clachnahaguig and the sea, including the privilege of cruive fishing, had

(1) *Magistrates of Inverness* v. *Duff of Muirtown and Others*, Mor. 14257.

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been transmitted to its disponees in feu. Of these fishings, three cobles and two-thirds of a coble are now vested in the appellants, who are the pursuers of this action. The remaining third is held by Mr. Innes, who was cited by them for his interest, but has taken no part in the litigation.

The appellants have a title flowing from the Crown which describes the precise limits of the grant. Its boundary on the south is a line drawn across the river at the stone of Clachnahagaig, and on the north is the sea; and between those termini their right of fishing extends to both sides, and every part of the water of the Ness, and must by necessity include the fishings in dispute. The respondent relied upon the fact that within these limits there are two fishings, the Duke of Gordon's and the Friar's Shot, which did not belong to the burgh in 1591, and are still held as separate tenements. That fact, he argued, was in itself sufficient to shew that the terms of the charter of 1591 cannot raise a presumption that the disputed fishings were not at its date owned and possessed by Lord Moray or his disponee; but assuming the contention to be well founded it does not go far to advance the respondent's case. It is clear that the burgh charter would have carried both the Duke of Gordon's fishing, and the Friar's Shot, if their owners had not been able to instruct a preferable title. The right which the charter gives to the appellants cannot be lost by their non-user, although it may be ousted in whole or in part, either by an express grant earlier in date, or by a title of any date, which though not express is capable of being construed, and has been construed by possession following upon it for the requisite period. The appellants' title must therefore prevail, unless the respondent can establish that he has an earlier right which expressly includes the Holme fishings from Clachnahagaig to Ness Cottage, or otherwise that his title is not only capable of being applied, but has been applied to these fishings by actual possession.

The Moray charter of 1566, which is twenty-five years older than the burgh charter, proceeded on a resignation of the comitatus by Earl James for new infeftment in favour of himself and spouse jointly with survivorship. No sasine upon either charter has been produced; and so long as they continued to be

personal writs, they could not in any legal sense give rise to competing rights of salmon fishing. But the parties to this appeal argued on the footing that both grants were feudalised shortly after their respective dates, and I shall therefore deal with the case upon that assumption. Both charters being writs by progress, it must necessarily be held that the Moray grant of salmon fishings is the earlier of the two. The question remains whether the charter of 1566 either expressly or by necessary implication includes the fishings in question, so as to make it not only prior tempore, but potior jure in competition with the charter of 1591.

A royal grant of salmon fishings described by precise and definite limits constitutes a bounding charter; and the grantee cannot by usage extend his right beyond these limits. Where a grant is of lands bordering on a non-tidal river like the Ness it carries the river bed usque ad medium filum aquæ. If the lands be conveyed "with the salmon fishings of the same" the grant will presumably carry the fishings up to that middle line. But it is not a definite boundary, and just because it is not so the grantee may shew that his right extends from his own bank beyond the medium filum, as was held in *Earl of Zetland* v. *Tennent's Trustees* (1). In like manner the grantee's right may be limited by possession under a charter in similar terms to the proprietor of the opposite ripa. In this case there is no reliable evidence to shew in what shape the lands of Holme were owned and possessed by the Earl of Moray and the Laird of Calder during the 16th century. The descriptions in the earlier titles do not suggest that each of them was in possession of a divided half either of the "Villa de Holme" or of the mill. The respondent states his belief that "the portion held from Lord Moray includes the whole river frontage;" and his agent Mr. Charles Innes gives evidence to the same effect; but his testimony is conjectural, and that of Mr. Innes is founded upon descriptions occurring in writs by progress, the earliest of which bears date 130 years later than the first sasine in favour of the family of Mackintosh. Assuming, however, that the whole riparian land of Holme was held and possessed in severalty by the Earl of

(1) 11 Court Sess. Cas. 3rd Series, 469.

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Moray that circumstance does not in my opinion materially affect the merits of the present question. It might have been of some consequence if the respondent's title had been to the salmon fishings "attached to" or "ex adverso of" a several half of the lands belonging to Lord Moray. Even in that case it might not have been conclusive in his favour. But Lord Moray's title is to one half of an integer comprising the whole fishings attached to the entire estate of Holme; and the respondent's own titles deduced from the charter of 1566 give him in the first place one half of the lands of Holme, and in the second place one half of the fishing upon the water of Ness pertaining to the lands of Holme.

In my opinion the salmon fishings of or pertaining to the lands of Holme must primâ facie be taken to be the fishings ex adverso of these lands from bank to mid-channel along the whole length of their river boundary, and the evidence shews that no part of the river to the west of its medium filum is included in the Holme fishings. The respondent has right to a half of these fishings and no more. That is the construction put upon his titles by all the judges of the Court below. Lord Young, who with the Lord Justice Clerk, (Lord Moncrieff), formed the majority of the Second Division, says: "With respect to the fishing I think he has under the Crown grant to Lord Moray—regularly and properly transmitted to him—a title to one half of the whole fishings pertaining to the whole lands of Holme. There is no grant of fishings in the title held under Balnain, and his title to fishings, so far as we see, stands upon the Crown grant to the Earl of Moray, properly transmitted to him, of one half of the fishings pertaining to the whole lands of Holme" (1).

Now half of the salmon fishing ex adverso of lands on one side of a river may mean one or other of two things; either a pro indiviso right to a moiety of the fishings all along their frontage (for in such a case I can hardly conceive the possibility of longitudinal division), or the whole fishing along such part of the frontage as will, having regard to the suitability of the water for fishing purposes, fairly represent a moiety. Neither the charter of 1566 nor the subsequent titles define which of these things is

(1) 15 Court Sess. Cas. 4th Series, p. 844.

meant; and it is obvious that a moiety of the Holme fishings, in either sense, would satisfy the description which they give of the respondent's right. It appears to me that the indefinite right of the respondent, though earlier in date, cannot prevail over the express right of the appellants, so long as it is not shewn that the former either did not or could not apply to a half in severalty. But it is an undisputed fact that the fishings to the south of Clachnahagaig, and outside the limits of the appellants' grant, are, in extent of frontage and intrinsic value, fully equivalent to a moiety of the whole fishings of Holme. And it is also a fact established by the evidence, and not disputed, that the respondent and his predecessors have, from time immemorial, had the exclusive possession of the entire salmon fishings of Holme between Clachnahagaig and their southern boundary.

Both parties led proof for the purpose of instructing their counter averments of exclusive possession of the fishings in dispute. The Lord Ordinary (McLaren) thought the proof was not conclusive in favour of either of them; and he found and declared that the appellants have the exclusive right, by virtue of their title derived from the burgh charter of 1591. His Lordship does indicate an opinion that the "greater part" of the salmon fishing confirmed by that charter must have been in the possession of the burgh from very early times; but the real ground of his judgment appears to me to be expressed in these words: "The grant to the magistrates includes both banks of the river, from the stone of Clachnahagaig downwards; but there is a reasonable extent of river boundary above the stone of Clachnahagaig which the proprietors of Holme have enjoyed without dispute, and this fishing includes what all the witnesses agree in declaring to be the best pool on the Ness. It appears to me, therefore, that there is no contradiction between the two titles. The title of the magistrates ought to receive effect according to its boundaries, and sufficient effect is given to the conveyance of the fishings of Holme to Lord Moray, by holding that conveyance to apply to so much of the water as has admittedly been possessed by the proprietors of Holme without dispute" (1).

The Second Division recalled the judgment of the Lord

(1) 15 Court Sess. Cas. 4th Series, p. 839.

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Ordinary, and assoilized the respondent. The majority were of opinion that the evidence shewed joint possession by the parties, under their respective titles, of the Holme fishings below Clachnahagaig; and, consequently, that no effect could be given to the conclusions of the action, which are framed on the footing of the appellants having the exclusive right. Lord Rutherfurd Clark differed, being of opinion that the appellant had not proved possession of the lower fishings, and that the exclusive possession of the upper fishings, had by himself and his predecessors, was sufficient to identify them with the subject of grant in Lord Moray's charter.

The practical effect of the judgment of the Second Division is to leave the respondent in possession of three-fourths, whereas his titles only give him a half of the salmon fishings of Holme. It appears to me that such a result can only be reached in one or other of these two ways,—either by holding that his title to a moiety has been enlarged by prescriptive possession, or that his title, as construed by user, embraces half only of these fishings along their whole frontage, and that he is, consequently, in the exclusive possession of part of the upper fishings without any title. The respondent does not allege that he or his ancestors were ever vested with a right to fishings of Holme, other than that which they derived from Lord Moray; and it is, in my opinion, an idle suggestion, that their acts of possession in the upper waters were intended to be, and were in fact, partly with and partly without title. I agree with Lord Rutherfurd Clark in thinking that their exclusive possession of the fishings above Clachnahagaig can only be attributed to their title from Lord Moray, and that it is sufficient to identify these fishings with the half pertaining to the lands of Holme, described in the charter of 1566 and subsequent writs. Entertaining these views, I think it admits of serious question whether the respondent's titles afford a legal basis for acquiring, by prescriptive usage, part of the fishings below Clachnahagaig, in addition to the half which he has got above. But I do not find it necessary to decide the point, because, on the assumption that the respondent's title is capable of being so extended, the evidence of possession adduced by him does not appear to me to be sufficient for that purpose.

The evidence as to possession goes back to the year 1804, the older portions of it consisting of the depositions of witnesses examined in a process of interdict brought before the Sheriff Court of Inverness-shire in 1843, by the respondent, then a minor, with the consent of his curatrix, against the tenant of the fishings within the burgh grant. These fishings were principally worked by means of cruives, situated below the north march of the Holme estate, until 1824 or 1825 when they were removed. So long as these fixed engines were maintained, they intercepted all the larger fish, no salmon above seven or eight pounds' weight being able to pass them, except during spates. Between 1804 and 1820 the cruive fishers were in the habit, either after a flood or when the river was very low, of fishing both sides of it with hang-nets up to Clachnahagaig; and there is no evidence of any fishing by the proprietors of Holme or any one in their right. Counsel for the respondent argued that hang-nets, as described by the witnesses, are forbidden by the old Scotch statutes, and probably that is so; but the use of a destructive and illegal method of fishing, whilst it cannot avail those who practise it for the purpose of establishing a prescriptive right, may, nevertheless, go a long way to negative the possibility of legal possession by any one else. There is also the uncontradicted testimony of one witness, to the effect that, about the year 1817, he took a lease of the Holme salmon fishings for one year from the proprietor, Angus Mackintosh, who then stated that he could not give his tenant right to fish below Clachnahagaig.

The evidence applicable to the period between 1820 and 1840, or about that date, is of a neutral character. During that period, the tenants of the Holme fishings were also lessees of the whole or a pro indiviso share of the burgh fishings; and it is impossible to discover to which of their leases such possession as they had of the fishings in the disputed water was attributable. It appears from the evidence on both sides that the disputed water is very inferior to the waters both above and below it, and to whichever right it belonged, was not likely to be much fished either with net or rod. That circumstance justifies the observation made by the respondent's counsel that, in any question of user, the amount of possession expected or required cannot be the

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same as if these disputed fishings had been of relatively greater value.

After the system of double tenancy came to an end, disputes arose with regard to the Holme fishings below Clachnahagaig, which resulted in the petition for interdict already referred to. The Sheriff-Substitute, on the 3rd of March, 1843, made an order for service upon the defender, and at the same time granted an interim and ex parte interdict against his fishing or drawing his nets upon the Holme side of the river. A record was made up and closed, and on the 26th of March, 1843, the Sheriff-Substitute allowed the defender a proof of his averments and to the petitioners a conjunct probation. A proof was led by the defender, the petitioners being represented by their agent. No proof was adduced by the petitioners, and the process fell asleep, but was resuscitated by a summons of wakening at the defender's instance in 1852. It is admitted that in the year 1853 the interim verdict was recalled, the parties to this case stating, in the course of the proof before the Lord Ordinary, that they "were not agreed as to the terms, if any, upon which it was recalled." The respondent, in his evidence, gives an explanation of the circumstances which prevented him from attending to his interests in that litigation. The only relevant fact deducible from the course of these proceedings is, that the respondent obtained an interim interdict in 1843, which was recalled in 1853; from which it necessarily follows that he cannot found upon his possession whilst the interdict stood as evidencing the right which he now asserts.

This part of the case is accordingly narrowed to the state of possession in the interval between 1853 and the month of March, 1887, when the present action was brought, a period which considerably exceeds the time now required for prescriptive possession. In the Inner House there was much discussion as to the value of possession by angling only. Lord Rutherfurd Clark (1) expressed his opinion "that when salmon fishings can be fished by net and coble, mere angling cannot establish a prescriptive right," and in support of that proposition his Lordship referred to *Richmond* v. *Seafield* (2). The Lord Justice Clerk held, that

(1) 15 Court Sess. Cas. 4th Series, 852.

(2) 8 Court Sess. Cas. 3rd Series, 530.

if a Crown grantee of salmon fishings found it more profitable to fish with the rod, that would be as good possession as if he had fished with net and coble; but his Lordship suggests a doubt whether angling for salmon will suffice to enlarge a right cum piscationibus into a right of salmon fishing. Lord Young indicates that, in his opinion, a general grant of fishings may be explained into a grant of salmon fishing by such commercial and profitable use as can be had of it, as, for instance, by letting it out for rod fishing at a large rent.

I think the law is too broadly stated by Lord Rutherfurd Clark, if a very strong qualification be not implied in the words "mere angling." In *Stuart* v. *M'Barnet* (1) Lord Westbury expressed his opinion that although it is true in the law of Scotland, as an affirmative proposition, that an ambiguous grant of piscationes alone may be interpreted into a jus piscandi salmonum by evidence of user of net and coble, yet he did not apprehend the law of Scotland to warrant the negative proposition that no evidence whatever, except user by net and coble, would be sufficient to establish it. That statement of the law was made obiter, but Lord Colonsay took occasion to express his concurrence (2). I have no doubt that the noble Lords referred to fishing with the rod; but I do not think they meant to suggest that any kind or amount of rod fishing would be sufficient. If a proprietor holding a grant cum piscationibus by preventing intrusion upon his water, was enabled to let it at a rent of £100 a year, for angling merely, instead of letting it to net and coble fishers for £50, I should certainly be of opinion that he was in as full and effectual possession of the right of salmon fishing as if he or his tenant had fished with net and coble. Moreover, I see no reason for holding that the doctrine ought to be confined to the case where a proprietor lets his fishing. But I do not think that occasional angling will be sufficient, or that the use of the rod will be of any avail, when it is practised in competition with net and coble fishing. The latter is by far the more destructive method, and, besides the mere slaughter of the fish, it seriously

(1) Law Rep. 1 H. L., Sc. at p. 390.
(2) Law Rep. 1 H. L., Sc. at p. 391.

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interferes with an angler's sport. That appears to me to have been all that was decided in *Richmond* v. *Seafield* (1) where the facts were that A., a riparian owner, under a Charter of Barony cum piscationibus, fished from his own bank of the Spey with the rod, whilst B., holding a Crown grant of the salmon fishings upon the river, according to use and wont, fished from A.'s bank with net and coble; and it was held that B. had, and A. had not, been in possession of the fishings ex adverso of the lands of the latter.

The respondent has no occasion to found upon his possession for the purpose of converting a general grant of fishing into a right to fish for salmon. He relies upon possession as construing his title and evidencing the particular salmon fishings to which it applies. For that purpose, I think that proof of user by rod and line, if regular and effective, and not disturbed by others fishing with net and coble, will be sufficient; and it therefore becomes necessary to consider the nature and extent of the possession had by him since 1853.

The Holme fishings were let by the respondent from 1853 till 1862 to Mr. Wicks, from 1863 till 1867 to Mr. Reeves, and from 1868 till 1879 inclusive, to Mr. Denison. In all these cases, the leases granted by the respondent expressly included the disputed fishings as well as those above Clachnahagaig. When a lease is an ancient document, there is a presumption, more or less strong, that possession followed upon it; but the terms of a modern lease cannot prove the fact of possession, although, possession by the tenant being otherwise proved, they will shew the title under which it was enjoyed. Mr. Wicks regularly fished the upper pool of Holme, but the only evidence of his fishing in the disputed water is that of two witnesses, one of whom says that he "has seen" Mr. Wicks fishing there, but how often, and whether with net or rod, he does not say, and the other depones, in terms equally vague, "I have seen him net the river down to Ness Cottage." After Mr. Wicks left, the fishing tenants only used rod and line. During Mr. Reeves' lease, one witness says that he saw him fishing below Clachnahagaig. Mr. Denison's lease began in 1867, and neither he nor anyone in his right fished

(1) 8 Court Sess. Cas. 3rd Series, 530.

below Clachnahagaig. In 1878 and 1879, the respondent, seeing that Mr. Denison did not care about fishing in the lower water, gave Mr. Innes, his agent, leave to fish there; and on the expiry of Mr. Denison's lease, Mr. Innes became tenant of these lower fishings, and continued to be so until this action was brought. Mr. Innes does not appear to have fished much, but he gave permission to others who angled in his right. These facts might have been of importance had it not been for the fact that, ever since 1878 Mr. Innes has been the owner of a share of the burgh right to the extent at first of one-sixth and afterwards of two-sixths of a coble. Mr. Innes, it is true, depones that he always gave his licensees distinctly to understand that their permission was to exercise the right derived by him from the respondent. In these circumstances, I am of opinion that neither his own angling, nor that of the licensees, to whom Mr. Innes made such an intimation, can be regarded as legal possession of the disputed salmon fishings by the respondent. The appellants could not be expected to challenge either their co-owner, or persons known to be fishing with his leave.

It therefore appears that there has been no net fishing in the disputed water since the expiry of Mr. Wicks' lease, or, in other words, for five-and-twenty years before this action was raised; and the evidence does not suggest that Mr. Wicks used the net on many occasions. During the next five years it is proved that Mr. Reeves, the tenant, was seen "fishing," by which I understand that he was angling; but whether he fished every year, or with anything approaching to regularity, does not appear. Then for the ten years from 1868 to 1877, both inclusive, there is no evidence of possession; and from 1878 till the date of the action, there is nothing proved, beyond occasional angling for salmon by Mr. Innes and those persons to whom he gave permission, which cannot, in my opinion, be regarded as a legal assertion of the respondent's right to the fishing, either exclusively or in common with others.

For these reasons I am of opinion that the judgments appealed from ought to be reversed, and that the appellants ought to have decree in terms of their summons.

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LORD MACNAGHTEN:—

My Lords, I have had the advantage of reading the two opinions which have just been delivered, and agreeing as I do with your Lordships both as to the construction of the documents and as to the result of the evidence, I do not desire to add anything—I concur in the motion.

[Both sides expressed their assent to their Lordships fixing the boundary line in order to end the dispute.]

LORD HERSCHELL:—

In view of the question put at the commencement of the proceedings to-day having been answered as it has been, by the Lord Advocate and the Dean of Faculty, their Lordships have considered what line ought to be drawn, and have come to the conclusion that the proper line to draw is one drawn from the point described as "Position of Clachnahagaig according to James Macdougall," perpendicularly across the river, so that it will come on the opposite side of the river a little below the point where there is a small cottage with six fir trees in front. It will come almost opposite a red mark upon the plan.

Ordered,—Interlocutors of the Second Division of the 6th of July, 1888, *and the 17th of October,* 1888, *appealed from Reversed. Interlocutor of the Lord Ordinary of the 10th of January,* 1888, *Restored, except in so far as the said Interlocutor by finding for the pursuers in terms of the conclusions of the summons, fixes the boundary between the respective fishings which is varied as hereinafter mentioned. Further ordered, the Parties by their Counsel consenting, that the boundary between their respective salmon fishings at the stone of Clachnahagaig be fixed and determined to be a line shewn in red and marked A B on a copy of the plan No.* 32 *of progress lodged in the Parliament Office. Cause remitted to the Court of Session. The respondent to repay*

any costs paid him by the appellants, and to pay the costs here and in the Court of Session.

Lords' Journals, 17th February, 1890.

Agents for the appellants: *Martin & Leslie, for Skene, Edwards, & Bilton, W.S., Edinburgh.*

Agent for the respondent: *Andrew Beveridge, for Forrester & Davidson, W.S., Edinburgh.*

[HOUSE OF LORDS.]

SIR A. D. STEWART, BART. . . . . APPELLANT;

AND

J. S. KENNEDY AND ANOTHER (DECLARATOR, &c.) . . . . . RESPONDENTS.

APPEAL No. 1.

Entail—Sale of Entailed Estate "subject to Ratification"—Specific Performance—English and Scotch Law—Scotch Entailed Estates Acts (11 & 12 *Vict.* c. 36; 16 & 17 *Vict.* c. 94; 38 & 39 *Vict.* c. 61; 45 & 46 *Vict.* c. 53).

By the Scottish Entail Amendment Acts (11 & 12 Vict. c. 36, s. 4; 16 & 17 Vict. c. 94, s. 5; 38 & 39 Vict. c. 61, ss. 5, 6; 45 & 46 Vict. c. 53, s. 13), the heir of entail in possession of an entailed estate is authorized to sell such estate, and to execute a deed of conveyance for giving effect to such sale, and the Court, upon an application for its sanction thereto, and upon such consents as are required by the recited Acts being obtained, shall approve such sale, with power to dispense with the consent of any heir entitled to succeed, and to ascertain the value of his expectancy; and thereupon the deed shall have the same effect as if it had been executed at the sight of the Court in terms of the recited Acts.

By 45 & 46 Vict. c. 53, ss. 19, 20, 21, 22, it is further provided that any such heir of entail may apply to the Court for an "order of sale" of the estate, with a view to the substitution of money for the entailed estate, and the Court, subject to certain restrictions, may order it to be sold by public auction or private bargain, provided that the sale should not be by private bargain if either the applicant or the next heir shall intimate within one month after the order for sale that he desires the sale to be by public auction.

The appellant, heir in possession of entailed estates, by a letter under his own hand, offered to sell the estates to the respondent at a fixed price. The letter contained these words: "The sale is made subject to the ratification

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of the Court." The offer was accepted. The appellant presented a petition for an order of sale of the estate under the last-mentioned provisions of 45 & 46 Vict c. 53, contending that this was a discharge of his obligation to take steps for obtaining the ratification of the Court, and thereupon the next and only heir of entail objected to the sale as being against his patrimonial rights, and demanded a sale by public auction :—

Held, affirming the decision of the Court of Session (16 Court Sess. Cas. 4th Series, 421), that the procedure adopted by the appellant for obtaining the ratification of the sale was not such as was contemplated by the contract, and that he was bound to take the requisite steps under the earlier Acts for disposing of the estates without the consent of the other heirs of entail :

Held, further, that the acts required on the part of the appellant to complete the sale were not of such a character as to make a decree for specific performance improper.

APPEAL against interlocutors of the First Division of the Court of Session, affirming the judgment of the Lord Ordinary, Lord Trayner (1), in an action of declarator implement and damages raised by the respondent, John Stewart Kennedy, banker, New York, and his mandatory, J. A. Jamieson, against the appellant, Sir A. D. Stewart, of Grantully, Perthshire, Baronet.

The appellant was the heir of entail in possession of the estates of Grantully, Murtly, and others in Perthshire, which consist of about 33,000 acres, of the annual value of about £15,000. He had no children, and at the date of the action was about eighty-one years of age. The only other heir of entail was Mr. Fothringham, of Pourie and Tealing, aged twenty-six, and unmarried.

On the 19th of September, 1888, the appellant wrote this letter to Mr. Kennedy, copying its terms from a letter handed to him by a Mr. Glendinning :—

" Dear Sir,—Having reference to my interview and conversation with you and Mr. Glendinning, yesterday, I now desire to say that I am willing to dispose of the entire estate of Murtly, &c., consisting of about 33,000 acres, with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof, for ever, on the basis of twenty-five years' purchase of the present, or even on appraised valuation of the nett rental thereof as may be ascertained by an agreed

(1) 16 Court Sess. Cas. 4th Series, 421.

appraisement, you appointing one and me the other, and if the two cannot agree a third party to be chosen by the two. Payment to be made in cash unless it can be otherwise agreed as to any part, and possession to be given not later than the 15th of May, 1889. This offer to be open for your acceptance for two weeks from this date, and on your notifying to me or to my agents of such acceptance on or before the expiry of that time it will be binding on me. In the event of your acceptance, the sale is made subject to the ratification of the Court.—Yours truly,

"A. D. STEWART."

On the 20th of September, 1888, Mr. Kennedy wrote:—

"Dear Sir Douglas,—I hereby accept your offer of the entire estate of Murtly, &c., with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, as contained in your letter to me of yesterday's date, and I agree to purchase said estate, &c., at twenty-five years' purchase of the present net rental thereof, and that on the conditions set forth in your said letter, a copy of which is annexed hereto.—Yours faithfully,

"JOHN S. KENNEDY."

On the 5th of October, 1888, the appellant wrote to Mr. Kennedy:—

"I am quite satisfied, on reflection, that my offer was a very foolish one, and I should never have made it if I had not been hurried and pressed, or if I had taken proper legal advice, as I certainly should have done. I am told now that there are legal difficulties in the way of which I was not then aware, and it appears that it is by no means matter of certainty that the Court will agree to ratify the proposed arrangement. That may involve unpleasant publicity and the interference of the next heir of entail. I should be well pleased if you see your way to release me altogether from it.

"If, however, you insist upon it, I am ready to endeavour to obtain the ratification of the Court, which I am advised can

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only be done for an order or authority to sell in terms of our contract."

Mr. Kennedy having refused to rescind the bargain, the appellant wrote on the 20th of October, 1888:—

"You are mistaken in supposing that on my part every step was taken after full consideration. When I was approached recently by Mr. Glendinning (acting, I presume, in your interest, certainly not in mine), I had had no thought of a sale for years past. It was upon his initiative and his eager solicitation, without time to take advice, or even fairly to consider what I was doing, that I rashly and weakly yielded to pressure, and copied out, with slightest alterations, from a draft he brought in his hand, the letter I wrote you on the 19th ult. In such a matter as this, a man of my very advanced age stands at a grave disadvantage; and I ought never to have been asked, still less urgently pressed, to enter into such an important transaction, and write such a missive, without legal advice. While willing, in the first place, to take the necessary steps to ascertain whether the Court will ratify the arrangement by granting the authority to sell you, in terms of our letters, I think it is right to say to you at once, that I will not ask authority to sell otherwise or differently, and that my application to the Court will be made without prejudice to all rights legally competent to me to have the contract between us set aside—all which rights are expressly reserved.

"There are, as I told you in mine of the 5th, many legal difficulties in the way, of which I had formerly no idea. For example, I am told the next heir of entail is entitled to appear in the proceedings, and to prevent a sale by private bargain, which, of course, would at once preclude the possibility of the Court's ratification of the transaction."

On the 6th of November, 1888, the appellant presented a petition to the Lord Ordinary to ratify and confirm the sale constituted by the letters of the 19th and 20th of September, 1888, and to grant an order of sale of the estates at the price of £372,892 10*s.* 10*d.*, being twenty-five years' rental; and, further, to authorize the price, after payment of expenses and incum-

brances affecting the estates, to be invested in terms of the Act of 1882. The petition recited and was presented under the authority of the sections of the Act of 1882, beginning with the 19th section (1), which confer the new power on an heir of entail in possession to convert the entailed land into entailed money.

The next heir of entail appeared in answer to this petition, and alleged that the sale in the manner and at the price proposed would injuriously affect his patrimonial interests.

This action was on the same date, the 6th of November, 1888, raised by the respondent, Mr. Kennedy, to compel the appellant to carry out the contract. His summons, as amended at the suggestion of the Court, sought a declarator that the respondent was bound to implement the contract and should be ordered forthwith to execute a formal disposition of the lands in question to him (Kennedy) containing all usual and necessary clauses as the same shall be adjusted; "and to make and prosecute to a conclusion an

(1) Sect. 19 of the Act of 1882 (45 & 46 Vict. c. 53), provides:—

"It shall be lawful for the heir of entail in possession of any entailed estate, or where an entailed estate consists of land held in trust for the purpose of being entailed for the person who, if the land had been entailed, would have been the heir in possession, or for the tutors, curators, or administrators of such heir or other person, to apply to the Court for an order of sale of the estate or part of it."

Sect. 21 enacted that "The Court shall procure a report as to the value of the estate, and as to the rights and charges affecting it, and shall, unless it appear that any patrimonial interest would be injuriously affected thereby, order the estate, or a part of it; to be sold in such manner as they think proper.

"Provided that in the case of any such application by or on behalf of a married woman, minor, pupil, or other person under disability, the Court shall not make the order unless they are satisfied that it will be for the benefit of the applicant."

Sect. 22 provided: "The Court shall fix the time and place and manner of sale, and may authorize the sale of the estate, or such part of it, in whole or in lots, and either by public auction at such upset price, or by private bargain at such price as the Court may direct, or partly by public auction and partly by private bargain, and, if more advantageous to the parties, may direct the sale to be for a feu-duty instead of a price to be immediately paid, or partly for a feu-duty and partly for a price.

"Provided that the sale shall not be by private bargain if either the applicant or the next heir shall intimate within one month after the order for sale that he desires the sale to be by public auction.

"When the estate is sold by public auction any creditor or person interested, other than the applicant, may be the purchaser."

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application to the Court for the sanction and approval of the sale, and disposition in terms of the Acts of 11 & 12 Vict. c. 36 (1);

(1) Sect. 3 of the Act of 1848 (11 & 12 Vict. c. 36), provides: "That it shall be lawful for any heir of entail being of full age and in possession of the entailed estates in Scotland, holden by virtue of any tailzie dated prior to the 1st of August, 1848, to acquire such estate, in whole or in part, in fee simple by applying to the Court of Session for authority to execute, and executing and recording in the registry of tailzies, under the authority of the Court, an instrument of disentail, in the form and manner hereinafter provided: provided always, that such heir of entail in possession shall be the only heir of entail in existence for the time and unmarried, or otherwise shall have obtained the consents of the whole heirs of entail, if there be less than three in being at the date of such consents and at the date of presenting such application, or otherwise shall have obtained the consents of the three nearest heirs who at the said dates are for the time entitled to succeed to such estate in their order successively immediately after such heir in possession, or otherwise shall have obtained the consents of the heir apparent under the entail, and of the heir or heirs in number not less than two, including such heir apparent who in order successively would be heir apparent: provided also, that the nearest heir of entail for the time entitled to succeed to such estate immediately after such heir in possession, where any such other heir exists, shall be of the age of twenty-five years complete, and not subject to any legal incapacity."

Sect. 4: Provides "That it shall be lawful for any heir of entail, being of full age, and in possession of an entailed estate in Scotland, with such and the like consents as by this Act would enable him to disentail such estate, to sell, alienate, or dispone, &c., such estate in whole or in part, and that unconditionally or subject to conditions, restrictions, and limitations according to the tenor of such consents, the authority of the Court of Session being always obtained thereto in the form and manner hereinafter provided. And such heir of entail shall be entitled to make and execute at sight of the Court all such deeds of conveyance and other deeds as may be necessary for giving effect to the sales, &c., so made and granted."

Sect. 33 provided that it shall be lawful for any heir of entail in possession desiring to take advantage of any of the provisions of this Act, as to which the authority of the Court is by this Act required, to make application to that effect by way of summary petition to the Court, and such petition shall set forth the tailzie, under which such estate is held, and the date of petitioner's infeftment therein, if any be, and the names, designations and places of abode, so far as known to the petitioner, of the heirs substitute of entail, whose consents are required to such petition, and whether such heirs substitute are of age to consent, &c.

Sect. 34. The Court was to order intimation of such petition to be made in the minute book, and on the walls in common form, and to be publicly advertised.

Sect. 35 provided that after intimation and advertisement as aforesaid, "it shall be competent to such petitioner to move the Court to grant the prayer of such petition; and if the procedure shall appear to the Court to be regular and proper, the Court shall interpone their authority, and give

16 & 17 Vict. c. 94 (1); 38 & 39 Vict. c. 61 (2); 45 & 46 Vict. c. 53 (3), and upon the Court sanctioning and approving as aforesaid to deliver the disposition to the respondent."

degree authorizing such petitioner to do and perform the act or acts proposed in such petition in so far as the same may appear to the Court to be permitted by this Act, or the Court shall do otherwise in reference to such petition as may appear to them to be proper and consistent with this Act."

(1) Sect. 5 of the Act of 1853 (16 & 17 Vict. c. 94) provides: "It shall be lawful for any heir of entail who is or shall be in a position to sell, alienate, dispone, &c., his entailed estate, in whole or in part, under the provisions of the said recited Act (11 & 12 Vict. c. 36), to execute without the previous sanction of the Court a deed of conveyance or contract of excambion, or other deed for giving effect to such sale, &c.; and to produce such executed deed either along with an application to the Court for its sanction thereto, or at any time in the course of the proceedings under such application when he shall think fit, or when such production shall be ordered by the Court; and on such application being presented, and such consents, if any, as are required by the said recited Act being obtained, containing express consent to and approval of such deed of conveyance or contract of excambion, or other deed executed as aforesaid, and on the Court being satisfied that the procedure is regular and in conformity with the recited Act and of this Act, the Court shall pronounce an interlocutor approving of such sale, &c., and of the deed executed as aforesaid for carrying the same into effect, and thereupon such deed shall have the same force and effect in every respect as if the same had been made and executed at the sight of the Court in terms of the said recited Act."

(2) Sect. 5 of the Act of 1875 (38 & 39 Vict. c. 61), provides (sub-s. 2), amending sect. 3 of 11 & 12 Vict. c. 36, "In the event of any of the aforesaid heirs (mentioned in the recited section), except the nearest heir for the time, whether an heir apparent or not, entitled to succeed, declining or refusing to give, or being legally incapable of giving his consent, the Court may dispense with such consent in terms of the provisions following." Then follow provisions for ascertaining the value in money of the expectancy or interest in the entailed estate of such heir or heirs, and upon such value in money being ascertained to the satisfaction of the Court, the Court shall direct the amount to be lodged in bank for the benefit of the heir or heirs, the value of whose expectancy or interest has been ascertained, or that proper security shall be given over the estate which is the subject of the application for the amount so ascertained. And upon such value in money being so paid or secured to the satisfaction of the Court, the Court shall dispense with the consent of such heir or heirs.

Sect. 6 provides: The provisions of the preceding section shall apply also where an heir of entail in possession of an entailed estate in Scotland, holden by virtue of any tailzie dated prior to the 1st of August, 1848, applies for power to sell, &c., such estate in whole or in the part.

(3) Sect. 13 of the Act of 1882 (45 & 46 Vict. 53) provides: "In any

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In reply to this action the appellant averred (answer to cond. 7), that the letter constituting the offer was copied by him from a draft which Mr. Glendinning brought with him, and which he suddenly and earnestly pressed the appellant to copy out and sign there and then. That the appellant, who is eighty-one years of age and in very infirm health, yielded to the pressure thus brought to bear upon him when he was in a highly nervous, flurried and excited condition, and thus weak and facile wrote and signed the letter. That in doing so he did not intend to make or understand that he was making an offer which could by a simple acceptance be made finally binding on him, to the effect of excluding all further opportunity for consideration and advice, and all proper supervision of its terms by the Court in the interests of parties. In particular, he did not intend and would have absolutely refused, to enter into any bargain on the footing of his being obliged to disentail or sell the estates and compensate the next heir of entail. In the event of its being held that the said letter and the acceptance import any such obligation on the appellant as the respondent alleges, he avers that the said letter was impetrated from him under essential error, fraudulently induced by the respondent or his representatives.

The respondent denied the allegations as to pressure and fraud, and pleaded (cond. 2) that for many years the appellant had the intention of selling the entailed lands under powers conferred on him under the Entailed Estates Acts; and in the year 1885 he presented a petition to the Court under the said Acts for an order for the sale thereof. That the petition was after intimation

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application under the Entail Acts to which the consent of the heir apparent or other nearest heir is required, and such heir or the curator ad litem appointed to him in terms of this Act shall refuse or fail to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir, with reference to such application, and shall direct the sum so ascertained to be paid into bank in name of the said heir, or that proper security therefor shall be given over the estate and shall thereafter dispense with the consent of the said heir, and shall proceed as if such consent had been obtained, and the provisions of sects. 5 and 6 of the Entail Amendment (Scotland) Act, 1875, shall apply to the nearest heir as well as to other heirs, and shall apply to all applications to which consents are required, and to entails dated on or after the 1st day of August, 1848, as well as to entails dated prior to that date."

to the next heir remitted by Lord Shand to Mr. Gill, S.S.C., to inquire into facts and circumstances, and to two factors to report on the time, manner and place of sale and the upset price. That (cond. 12) when the agreement was entered into, the petition was still pending. And that on the 26th of October, 1888, the appellant enrolled this petition and obtained an interlocutor dismissing it.

On the 21st of December, 1888, the Lord Ordinary, Lord Trayner, found in favour of the conclusions of the summons, and ordained the appellant to implement the contract, and forthwith to present a summary application to the Court as concluded for, or otherwise to make such application to the Court in terms of the Entail Acts as shall entitle him to carry out and implement the contract.

On the 8th of February, 1889, the First Division pronounced an interlocutor adhering to the Lord Ordinary's judgment in so far as it repelled the pleas in law for the appellant, and found in favour of the declaratory conclusions of the summons, and quoad ultra recalled the judgment in hoc statu, and appointed the respondent to lodge in process within fourteen days the draft of a disposition by the appellant of the estates in question in favour of the respondent in fulfilment of the contract of sale.

On the 26th of February, 1889, the same division refused the appellant leave to appeal to this House.

On the 19th of March, 1889, Mr. Kennedy, having lodged in process a draft disposition, the Court of Session sisted process in respect of an action of reduction (1) raised by the appellant, Sir A. D. Stewart, against Mr. Kennedy, to have the missives of sale founded on set aside on the ground of facility, circumvention, error and fraud.

On the 18th of July, 1889, the House of Lords gave leave to the appellant to appeal, and subsequently the Appeal Committee, at the request of the respondent, advanced the hearing of this and the following appeal in consideration of the great age of the vendor, and the fact that if he died before completing the conveyance the contract would become null and void.

(1) 16 Court Sess. Cas. 4th Series, 857, post, p. 108.

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On appeal,

1889. Dec. 5, 6, 9. Sir *Horace Davey*, Q.C. (1), and *The Dean of Faculty*, (*J. B. Balfour*, Q.C.), (with them *Finlay*, Q.C., and *Dundas*, of the Scotch Bar), for the appellant:—

"Subject to the ratification of the Court" imported a suspensive condition attached to the agreement, that the Court should in its discretion ratify the terms of the contract as to price, &c., under the Act of 1882. That Act, by sects. 19 to 22, introduced into the law of Scotland a wholly new procedure. The surplus of the sale price was to become entailed money, and under clause 22 the Court was bound to express a judgment on the contract of sale, the rate of interest and the sale price. These provisions were much less onerous to an heir of entail of the great age of the appellant; and it was under these he agreed to sell. He was cognisant of this new procedure, having a petition pending. There was no doubt the next heir of entail had a right to demand a public sale, and if he did, the contract would go and in that sense the contract was defeasible; but only when the appellant obtained the sanction of the Court could such an agreement as this become a bargain. On the other hand, the functions of the Court under the Acts of 1848 and 1853 and subsequent statutes are purely ministerial and mechanical, and cannot be called a "ratification." The scheme of the Act of 1848 was to enable an heir of entail to disentail (sects. 3 and 4), with the consent of a certain number of the next heirs. And by sects. 33, 34, 35, the application to the Court is purely administrative. All the Court has to see to is that the proper consents have been given by persons not under disability, that the proceedings are regular, and the statements correct. These

(1) *Precedence of Counsel.* — Sir Horace Davey said it had been arranged he should first address the House.

The Dean of Faculty said it had been the custom when anyone holding the office of Dean of Faculty appeared in a Scotch appeal with English counsel, that the Dean of Faculty asserted his right to lead, however eminent the English counsel might be. He wished to say that this particular case, where an arrangement had been made, should not be cited as a precedent.

Sir Horace Davey replied, that on behalf of the English bar, by agreeing to this arrangement, he also must not be taken as admitting the claim to precedence made by the Dean.

proceedings appearing regular and proper, the Court must give a decree for the sale. Therefore under that Act the Court does not exercise any judgment as to price. The only alteration made by the Act of 1853 under which the Inner House have directed the proceedings here, is that the heir of entail in possession may *first* execute the deed of disentail or sale before obtaining the sanction of the Court: sect. 5; and then produce such executed deed along with an application for authority to record it. The Act of 1875 amended the Act of 1848, sect. 3, by allowing the Court to dispense with the consent of the next heirs of entail (except the nearest heir of entail) to the disentail on the money value of their interests being ascertained and provided for to the satisfaction of the Court: sect. 5, sub-s. 2. Then the Act of 1882, sect. 13, enabled the heir of entail to sell, without obtaining the consent of the next heir of entail, which had not been dispensed with by the Act of 1875.

Secondly, assuming the contract should be carried out under the Act of 1848 and amending Acts, this is a contract in which the Court ought not in its discretion to decree specific performance. There are a series of acts over which the Court cannot exercise control and supervision, and the Court does not grant specific performance of a contract which requires such acts to be performed: *Howell* v. *George* (1).

[LORD HERSCHELL mentioned *Walker* v. *Barnes* (2).]

In *Merry & Cunninghame* v. *Lord Glasgow* (3), on which the respondents rely, the decree required Lord Glasgow, who was an heir of entail, to disentail, so that he might perform his agreement for a long lease of ninety-nine years. But that was a merciful interposition of the Court; for if the Court had not helped Lord Glasgow, he might have been held guilty of committing an irritancy. Then in valuing the next heir's interests protracted litigation may ensue, and there is no case where a person has been ordered to prosecute legal proceedings involving litigious questions against a third party who is not a party to such a contract as this. In *Powell Duffryn Steam Coal Co.* v. *Taff Vale*

(1) 1 Madd. 1.
(2) 3 Madd. 247.
(3) Only reported *Scotsman*, under date 16th Dec. 1887, and of First Division, 14th March, 1888.

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Ry. Co. (1), James, L.J., after saying, "The Court has never ordered anything which involves doing something from day to day for an indefinite period," continued: "It is not the practice of this Court to compel by injunction either a company or an individual to do a continuous act which requires the continuous employment of people. The Court will in a proper case restrain a man from singing at one theatre; but it will not undertake to compel him to sing at another. It may restrain him from writing a book for one publisher, but it cannot compel him to write a book for another. Where what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to do some continuous act involving labour and care, the Court has never found its way to do this by injunction." See also *Wycombe Ry. Co.* v. *Donnington Hospital* (2).

[LORD HERSCHELL mentioned *Frederick* v. *Coxwell* (3).]

In Scotland, although the Court rarely refuses the parties their strict right, there is an equitable jurisdiction exercised by the Court. Lord Selborne, L.C., in *Grahame* v. *Swan* (4), and in the late case of *The Duke of Richmond* v. *The Great North of Scotland Ry. Co.* (5), Lord Kinnear exercised this equitable discretion, and refused to grant decree of specific performance.

Thirdly, this is an ambiguous contract, and a decree for specific performance ought not to be granted where the defender may prove that he understood and intended something very different from the pursuer's contention. The English Courts would not enforce such a contract, and the discretionary power which forms part of the law of Scotland applies to deprive the respondent of his option, and that even although the ambiguity does not rise to such an essential error as would give a right of reduction. In this view it is right to consider the relative positions of the parties in the event of the success of either. If the vendor succeeds in having the contract carried out under the Act of 1882, for which he contends, the money price will become entailed estate, and

(1) Law Rep. 9 Ch. at pp. 334, 335.
(2) Law Rep. 1 Ch. 268.
(3) 3 Y. & J. 514.
(4) 7 App. Cas. at p. 565.
(5) 16 Nov. 1889. Reported only in the "*Scotsman*," under date 18 Nov. 1889, see post, p. 88.

he will have no further care, and the respondent has his claim for damages. But if the contract is carried out as the Court below has decided, the vendor must compensate the next heir, and he may have to pay the next heir more than he receives. This divergence in the result sets up a considerable equity in favour of the appellant. Therefore the Statute of 1882 alone does equity, and satisfies the conditions of these missives, and the proper course is to order the payment of damage, and not specific performance.

The Lord Advocate (*J. P. B. Robertson*, Q.C.), and *Rigby*, Q.C. (with them *A. G. Murray*, of the Scotch Bar):—

The missives purport to constitute a complete contract. They constitute a specific specification of the particulars of the sale with the price and so on, and but for the words "subject to the ratification of the Court," the contract was enforceable by either party. Those words were inserted not to signify that the contract was to be subject to reconsideration on its merits, but to safeguard the appellant and his representatives from a claim for damages if he should not give possession before the date stipulated, or had no title, or died before he had executed the conveyance. They also gave notice that the land dealt with was entailed estate, and so avoided any charge of committing an irritancy. Under the Act of 1882 it is not for the Court alone to ratify, but the next heir may also object, and has done so; and he may demand a public auction, and if he does these things the sale under that Act is at an end. Therefore there is one method which would give effect to the sale, that adopted by the Court of Session, namely, under the Acts of 1848 and 1853, as amended; and one which would put an end to it. But where a vendor refers to some Act of Parliament for ratification of the sale, you must go to that statute which carries out the contract rather than to that which brings in a third party, who may destroy the transaction.

The law of Scotland, differing from the law of England, gives the right of specific performance as the natural and primary mode of performing a contract for the sale of a specific article, and only when the contract has become incapable of performance

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is a claim for damages substituted in place of performance (1). And the decree for specific performance is in the old style a charge of horning commanding the defender to implement and perform the whole articles of the contract. The editorial letter runs in the name of the Queen, and warrants caption and imprisonment of the defender if the Act is not performed. Nor is there any power in the Scottish Court to refuse specific performance because a vendor or debtor alleges that he misunderstood the contract, where such misunderstanding would not be a reason for reduction. There is no case in England where a misconception on the part of the defender is alone sufficient. If there ever were a case where mistake might have been argued, it might have been done, if competent, in *Gibbins* v. *The North-Eastern Metropolitan Asylum District* (2). In *Rossiter* v. *Miller* (3) and *Hussey* v. *Horne-Payne* (4) there were a series of questions on documents alleged to constitute concluded contracts, but no one contended, "As I misunderstood the contract, that ought to prevail to annul the contract." Indeed, if this plea were listened to, every defender might have the remedy of reduction by simply swearing he misunderstood. To avoid complete specific performance the error must be accompanied by considerable hardship. But there is no power in the Scottish Courts to interfere to abate the contract where specific performance can be given; although they do recognise with the English Courts that they must distinguish, in awarding specific performance, between what can and what cannot be done; and therefore they would not give an order for what would be in the circumstances ineffectual: *Moore* v. *Paterson* (5). In *The Duke of Richmond* v. *The Great North of Scotland Ry. Co.* (6), heard before Lord Kinnear, the demand was for specific performance ad factum præstandum, that in terms of a contract, the railway company should build up the sills of the smaller side spans of a bridge over the Spey to such a height (or to erect such other works as should be necessary) to cause the whole of the water to flow through the centre span; or that

(1) 1 Bell. Com. 5th Ed. p. 335; 7th Ed. p. 352.
(2) 11 Beav. 1.
(3) 3 App. Cas. 1124.
(4) 4 App. Cas. 311.
(5) 9 Court Sess. Cas. 4th Series, 337.
(6) 16 Nov. 1889. *Scotsman* under date 18 Nov. 1889.

the pursuer should be authorized to do it at the defender's expense. The Lord Ordinary would not grant a decree for specific performance, because he was of opinion from the facts that even if the sills were built up that would not have the effect desired by the pursuer, and would possibly aggravate the mischief of which the pursuer complained and cause damage to other parties by sending the water of the river over the adjacent land in time of flood. *Grahame* v. *Swan* (1) was the case of a pursuer suing in right of the community, and was no authority that a Scotch Court would abate a contract right. Then *Merry & Cunninghame* v. *Lord Glasgow* (2) is a direct authority in favour of the respondents. In *Howell* v. *George* (3) it was impossible to see how the contract could be carried out. *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (4) is totally inapplicable to this case. All sales of land require the title to be investigated, and a solicitor must be employed, and litigation may follow and extend from year to year; but those are not the continuous series of acts that case refers to.

All the appellant has to do is completely within his power. A Scotch heir of entail in possession is owner of the fee and has all the powers of a fee simple proprietor except in so far as he is subject to the restrictions imposed by the entailing deeds; and there is no excuse, on equitable grounds, when all he has to do is to have the interest of the next heir calculated.

In England from the earliest time it has been the principle of the Courts that a man shall do everything in his power to complete his contract. In *Holles* v. *Carr*, in 1676 (5), specific performance was decreed against an heir of entail in possession of an agreement made during the life of the tenant for life to levy a fine; and no doubt before that time the Court of Chancery ordered a man to suffer a recovery so as to make good his contract (6). See also *Lord Bolingbroke's Case* (7). The appellant must try every method and resource open to him, and do every

(1) 7 App. Cas. 547.

(2) *Scotsman*, under date 16 Dec. 1887, 14 March, 1888.

(3) 1 Madd. 1.

(4) Law Rep. 9 Ch. 331.

(5) 3 Swans, at p. 645.

(6) See *Powell* v. *Powell*, Pre. Chan. 278; *Weale* v. *Lower*, cited in *Fox* v. *Crane*, 2 Vern. 304; *Mortlock* v. *Buller*, 10 Ves. p. 315.

(7) 1 Sch. & Lef. note on p. 19.

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act that he can to fulfil the contract, and he has no valid defence to a decree for specific performance.

The Dean of Faculty, in reply.

Judgment after consideration.

1890. 17th February. LORD HERSCHELL:—

My Lords, the appellant is the heir of entail in possession of the estate of Murtly and other estates in the county of Perth. On the 19th of September, 1888, a contract was constituted between the appellant and respondent by missives in the following terms. [His Lordship read the letters of the 19th and 20th September, 1888, given above.]

It is not in dispute, and indeed could not be, that these letters created a binding obligation on the one part to buy and on the other to sell; but it is equally clear that the sale was "made subject to the ratification of the Court." It is on the meaning of these words that the controversy between the parties arises. In order to make the point at issue clear it is necessary to call attention to the provisions of the law relating to the sale of entailed estates in Scotland.

By the Entail Act of 1848, power was given to an heir of entail to sell the entailed estates provided he obtained the consent of the heirs of entail if less than three, or of the three next heirs of entail if there were more then in existence, and also obtained the authority of the Court of Session in the manner prescribed by the statute. If these conditions were fulfilled the heir was entitled to make and execute at the sight of the Court, all such deeds of conveyance and other deeds as might be necessary for giving effect to the sale.

By the Act of 1853, an heir of entail who was in a position to sell under the former Act, was empowered to execute a deed of conveyance without the previous sanction of the Court, and to produce such deed to the Court either with an application to the Court for its sanction to the sale, or at any time in the course of the proceedings under such an application, and on the Court being satisfied that the procedure was regular and in conformity with

the provisions of the Acts, it was to pronounce an interlocutor "approving of such sale . . . . and of the deed executed for carrying the same into effect," and the deed was then to have the same force and effect as if it had been executed at the sight of the Court.

By the Act of 1875, the Court was empowered, and indeed required, to dispense with the consent of all the expectant heirs whose consent was requisite under the former legislation, except the nearest heir for the time being entitled to succeed to the estate. Directions were to be given by the Court for ascertaining the value in money of the expectancy of the entailed estate of the heirs declining to consent, and for the payment into bank in the name of such heirs of the sum so ascertained. And the Court was then to dispense with these consents and to proceed as if they had been obtained.

Finally, by the Act of 1882, the Court was required to dispense with the consent of the nearest heir ascertaining his interest and proceeding in other respects as if his consent had been obtained; and the provisions of sections 5 and 6 of the Act of 1875 were made applicable to the nearest heir as well as to other heirs.

It will be seen that the result of this legislation was that an heir of entail of an entailed estate could dispose of it at his pleasure without the consent of any other of the heirs of entail by applying to the Court of Session and taking the proceedings prescribed by and complying with the requirements of the Acts to which I have called attention.

The Act of 1882, beside enabling consent of the next heir to be dispensed with, if steps were taken under the prior Acts for a sale of the estate, contained also provisions authorizing an entirely different course of procedure when an heir of entail was desirous of selling his estate. Sect. 19 empowered such heir "to apply to the Court for an order of sale of the estate." And by sect. 22 it was provided that in the case of such an application the Court should fix the time, place, and manner of sale; and (if a sale by private bargain was directed) the price to be paid. The section contains the following important proviso:—"Provided that the sale shall not be by private bargain if either

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the applicant or the next heir shall intimate within one month after the order for sale that he desires the sale to be by public auction." The next heir is therefore in a position to interpose an insuperable obstacle to a sale otherwise than by public auction, if an order for the sale of the estate is made under this part of the Act.

The appellant applied to the Court under these latter provisions to make an order for the sale of the estate in terms of the letters which I have already brought under your Lordships' notice. The application was met by the next heir with the objection that the sale was by private bargain to which he was not willing to assent.

The appellant insists that by making this application, and being ready and willing to take all the steps that can be taken on his part under it, he has fulfilled all the obligations under which he came to the respondent.

The real contest between the parties turns on this, whether "the ratification by the Court," to which the sale was to be subject, had reference to an application under the 19th section of the Act of 1882, or to proceedings under the earlier Entail Acts as modified by the provisions of sect. 13 of that Act.

It was contended, on behalf of the appellant, that the word "ratification" implied that the Court was to exercise its discretion with regard to the terms of the proposed sale, and to be free to confirm or not to confirm it, according to the judgment formed thereon, and that it was inapplicable to a course of procedure under which the Court has authority only to see that the requirements of the Acts have been complied with, and if they have been, has no option but to confirm the sale. But it is to be observed that under the alternative procedure, the Court is not left to a free exercise of its judgment whether a sale should be allowed on any particular terms. However well satisfied it may be with the terms of any private bargain, the next heir can render the Court powerless to authorize such a sale. And inasmuch as it is beyond dispute that the words under discussion had reference to one or other of the alternative methods of rendering a sale by an heir of entail effectual, it appears

clear that this contention of the appellant cannot influence their construction.

Whichever of the rival constructions be the correct one, the words employed are not the most apt that could be devised to indicate the procedure in contemplation. But the construction suggested by the appellant certainly does not enjoy any advantage in that respect. The procedure upon an application under sect. 19 of the Act of 1882 certainly would not take the form of a ratification of a past sale. For the Court would not only have to order a sale, but to fix its time as well as its place and manner, and it could hardly order that the estate should be sold at a time already past. I do not say that this difficulty is an insuperable one, or that such procedure could not possibly be regarded as a "ratification" if the appellant's construction otherwise commended itself to acceptance, but it shews that his construction has no special claim to be accepted by reason of the suitability of the language found in the agreement. On the other hand, it is to be observed that the interlocutor pronounced by the Court of Session, where the heir of entail sells under the powers of the earlier Acts, is one not merely approving of the deed for carrying the sale into effect, but also in terms "approving of such sale." If, then, I had to choose between the two constructions, having regard exclusively to the appropriateness of the language used to the one or the other, I should adopt that contended for by the respondent in preference to that which the appellant insists upon. But there is another consideration which weighs heavily in the balance. It is manifest that the parties intended that there should be a completed bargain. All the terms were definitely concluded, the price and date of possession were fixed, the sale was "made" subject to one thing only, "the ratification of the Court." But if the appellant's view be correct, it was made subject to something else, viz., assent, or at the least the absence of dissent on the part of the next heir. When I bear in mind the language of the missives, I find myself unable to hold that this was the intention of the parties. It seems to me more reasonable to adopt the construction of the Court below, that the ratification of the sale was to be sought and obtained under the provisions of the Entail

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Acts, which enabled the transaction to be carried out without the intervention of a third party in a position to bar the proceeding.

I have not overlooked the argument founded upon the expression that the sale was made "subject to" the ratification of the Court. It was said that these words shewed that it was in contemplation that ratification might or might not take place, whereas, if the respondent's construction were adopted, it must. But this is not so. If the appellant died before he was able to obtain the ratification the transaction would be at an end. And the insertion of the words was necessary to protect the representatives of the appellant in that case from possible liability.

When once the construction which has received the sanction of the Court below is adopted, the case is, in my opinion, concluded in favour of the respondent.

It was insisted, however, for the appellant, that this was not so. Two points were made. First, it was said that inasmuch as not only an application to the Court of Session, but various steps thereunder would be necessary before the sale could be carried out, it was not a case in which the Court would grant specific implement. No authority was cited which gives colour to such a contention. And it does not raise in my mind any serious difficulty. Where several Acts, such as would be required here, are necessary in order that a party may carry out that to which he has bound himself, I do not see why the Court should not enforce them just as much as if a single Act only were necessary, or that there would be any greater difficulty in its doing so.

The other point was this: assuming, it was argued, that the construction put upon the contract by the Court below was correct, still, if the appellant intended to sell only on the terms that an application should be made to the Court under sect. 19 of the Act of 1882, and that the procedure consequent thereon should be pursued, and understood the contract to have this effect, the Court ought not to grant specific implement, but to leave the respondent to his action for damages. It would be very hard, it was urged, in such a case to compel the appellant

to sell, inasmuch as the effect might be so very different to that which he anticipated. He might have to part with the estate and suffer a considerable loss of income. I think this point was an afterthought. I can find no trace of it in the pleas in law for the defender. It was probably the result of a study of the English cases relating to decrees for specific performance. I do not think it would be of any advantage to devote time to an analysis of the English decisions or to inquire whether a Court of Equity in England would refuse a decree for specific performance under the circumstances which are alleged to exist in the present case. For, I think, if that proposition could be established, it would afford no guide to the conclusion which ought to be arrived at where a decree for specific implement is sought in the Courts of Scotland. Specific performance was not a remedy to which a party was entitled at common law in England. To obtain it he was compelled to resort to the separate jurisdiction of the Court of Chancery, which at times refused its assistance, even where a legal right was established, leaving the party who invoked it to his ordinary legal remedies. In Scotland, on the contrary, specific implement is one of the ordinary remedies to which a party to a contract is entitled where the other party to it refuses to implement the obligation he has undertaken. And no authority has been cited to shew that such considerations as, it is suggested, would induce the Court of Chancery to refuse specific performance have ever been regarded as material where the ordinary remedy of specific implement is sought in an action in the Scotch Courts. I do not, of course, mean to say that it would not be open to maintain there, that in the circumstances of a particular case it would be inequitable to enforce that remedy, but a party to a contract certainly does not establish that proposition by shewing that he imagined its legal effect and operation to be other than they are.

For these reasons I think the judgment ought to be affirmed, and the appeal dismissed, with costs.

LORD WATSON:—

My Lords, the appellant, who is heir of entail in possession of the lands of Murtly and others, by missive offer duly accepted,

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agreed to sell the whole estate to the respondent for twenty-five years' purchase of the net rental. There is no allusion made in the missives to the fact of the estate being held under strict entail except in these, the concluding words of the offer, "In the event of your acceptance, the sale is made subject to the ratification of the Court."

The sale of an entailed estate by the heir in possession is ineffectual, and cannot take away the rights of succeeding heirs of tailzie, unless, by means of a petition under the Entail Acts, the seller either acquires the estate in fee simple, or obtains the authority of the Court in one or other of the modes permitted by these statutes. Accordingly, the parties are agreed that the words in question refer to an application of some kind to be made to the Court for its sanction to the sale, and also that the application must be at the instance of the appellant, he being the only person having a statutory title to institute and carry out such a proceeding. But they differ as to the nature of the application which is indicated by the expression "ratification of the Court." It is, therefore, necessary to consider the different proceedings which the parties severally allege to be within the contemplation of the missives of sale.

Any heir of entail, being the heir in possession, who has contracted to sell the entailed estate may execute a deed of conveyance for the purpose of giving effect to the sale, and then apply to the Court by petition for its sanction to the executed deed. At one time it was requisite, in such applications, that the petitioner should obtain and produce to the Court the express consents of certain heirs nearest to him in the line of tailzied succession; but these consents are no longer essential. The Act of 1882 has provided that, in case of such heirs refusing or failing to give their consents, the Court shall ascertain the value in money of their interests in expectancy, and, upon its being paid into bank in their names, or upon proper security therefor being given over the estate, shall dispense with the consents of these heirs, and shall proceed as if their consents had been obtained. In an application of this kind the Court is not required to consider the merits of the transaction of sale, or its effect upon the patrimonial interests of heirs under the tailzied destination. Its

sole concern is to see that, before the sale and conveyance are approved, due provision has been made for paying or securing the debts and incumbrances charged upon the fee or rents of the estate; also that the requisite consents have been given by heirs-substitute, or otherwise, that the respective values of their expectancies have been ascertained, and either paid or secured to them. When sufficient provision has been made by the petitioner, for satisfying or securing these charges and interests, it becomes the statutory duty of the Court to "pronounce an interlocutor approving of" the sale, and of the deed executed for the purpose of carrying it into effect. It is, in my opinion, a circumstance of some weight in this case that the death of the petitioner, at any time before final decree of approval has been pronounced, makes the whole procedure abortive. The next succeeding heir of tailzie, even when he happens to be the heir of line of the deceased, does not represent him in the entailed estate. Consequently, the purchaser can no longer claim specific implement, although, if the sale was in terms absolute, he has a claim of damages for breach of contract against the representatives of the seller.

The respondent maintains that an application in the terms just described is the only procedure which the missives contemplate. When regularly completed, it has the effect of putting an end to the entail. The purchaser gets the estate freed from its fetters, and the seller pockets the price, under deduction of heritable debts and family provisions, and of the sums payable to heirs-substitute, whether adjusted by private agreement, or ascertained by the intervention of the Court, in order to their consents being dispensed with.

The Entail Act of 1882, for the first time, empowered an heir in possession to apply to the Court for "an order of sale," either of the whole or of part of the entailed estate. When such an order has been made and carried out, the price, or, in the case of there being incumbrances, its surplus, is consigned in bank, subject to the orders of the Court, or is invested in the names of trustees appointed by the Court, in trust for the applicant and the heirs of entail in their order. In short, the price or its surplus is entailed money, which comes in place of the estate,

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and the successive heirs of entail become entitled to the interest arising from it just as they would have become entitled to the rents of the estate; and beyond that substitution of money for land there is no disturbance of the restrictions imposed, or of the course of succession prescribed by the deed of entail. The Court has power at any time to grant authority for applying the money in the purchase of other lands, to be settled in conformity with the subsisting destination.

In an application for an order of sale, intimation requires to be made, not only to creditors, but to the same heirs of entail whose consents would have been required to a petition for approval of a sale and conveyance. These heirs are entitled to appear "for the purpose of seeing that their respective interests are protected," but are not allowed to oppose the application. The Act next prescribes that the Court shall procure a report as to the value of the estate and as to the rights and charges affecting it, and shall, "unless it appear that any patrimonial interest would be injuriously affected thereby," grant an order for sale in such manner as it may think proper. The Court must, therefore, refuse the application if it appear that the present conversion of the estate will be prejudicial to the patrimonial interests of the heirs of tailzie to whom intimation is directed to be made. When a sale is ordered, it may be either by public auction or by private bargain, as the Court in its discretion shall think best; and in the one case the upset, and in the other the stipulated price, must be fixed by the Court; but it is expressly enacted that the sale shall not be by private bargain—if within a month after the date of the order of sale, either the applicant or the next heir shall intimate that he desires the sale to be by public auction.

The condition that the sale is to be "subject to" the ratification of the Court plainly implies that the seller's right to the price, and the purchaser's right to the estate, are alike suspended, and are not to come into existence, unless and until such ratification is actually obtained. It does not suspend the obligation, which is admittedly incumbent on the appellant, to take the proper steps for submitting the sale to the Court, with a view to its ratification, or the correlative right of the respondent to

demand that these steps shall be taken without unreasonable delay.

The language of the condition affords no positive definition of the ratification upon which the efficiency of the sale is to depend, except that it is to be a proper judicial act. Its efficacy is to be dependant upon the action of the Court, and not upon the will or choice of an individual. In ordinary parlance "ratification" is used to express the giving of consent by one without whose consent a transaction entered into by others would be incomplete or invalid; and also the confirmation of a provisional agreement or of an imperfect obligation by the same parties who made the one or were not legally bound by the other. Ratification by a Court of law may, in my opinion, signify that the Court is to examine the transaction submitted to it, and to decide according to its discretion whether the terms of the transaction are such that the parties ought or ought not to be bound by the agreement which they have made; or it may mean that the Court is to give its formal approval, without reference to the terms of the transaction, on being satisfied that due provision has been made for protecting and securing the legal interests of third parties which would be prejudicially affected if no such provision were made.

There is an important distinction between these two courses of procedure already noticed. In the one the only interest which the law recognizes as belonging to heirs whose consent is requisite, is a right to receive payment in money of the estimated value of their spes successionis. If that be secured to them, they have no concern with the amount of the price, or with the terms of the sale made by the heir in possession. In the other, these heirs retain the very same interest in the price which they previously had in the entailed estate; and it is on that account that the Court is charged with the duty of seeing that no sale is made on terms injurious to their patrimonial interest, and that the heir nearest in the line of destination has the power given him to forbid a sale otherwise than by public auction.

An interlocutor of the Court of Session approving of the contract of sale embodied in the missives, and of a conveyance executed by the appellant in conformity therewith, would, in my

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opinion, constitute a "ratification" within the meaning of the concluding stipulation. In that case the validity of the sale would, in the strictest sense of the words, be "subject to" the ratification. It would depend upon an uncertain event, because the requisite proceedings necessarily occupy some period of time, and no interlocutor of approval could be pronounced by the Court unless the appellant, who was upwards of eighty years of age at the time when he signed the offer, was then alive. The condition would not be, in that view, inofficious. In the event of the appellant dying before the approval of the Court was obtained, it would void the contract of sale, and protect his succession from the claim of damages which would otherwise be competent to the respondent.

The appellant maintains that his adoption of proceedings for the sale of the estate under the new provisions of the Act of 1882, and the submission of his private bargain with the respondent for the approval of the Court in the course of these proceedings, would be in literal compliance with the obligation laid upon him to take steps for obtaining the ratification of the Court. It was argued with considerable force that, if he were to follow the other alternative, the Court, proceeding (as it necessarily would do) on the basis of a new valuation of the estate, might possibly assign such a sum to the next heir, as the value of his interest in expectancy, as would leave the appellant nothing, or but a trifling sum, after discharging incumbrances; and that such a result cannot reasonably be supposed to have been within the intention of the contracting parties. Acting upon that view, the appellant, shortly after the date of the missive of acceptance, presented a petition purporting to be founded upon the provisions of the Act of 1882, in which he craved the Court to grant an order for the sale of the estate to the respondent in terms of the missives, and to authorize him to execute a conveyance for the purpose of carrying it into effect. Besides the appellant, there is only one other heir of entail in existence who lodged answers to the petition, in which, whilst disputing its competency, he objects to its prayer, on the ground that a sale in the manner and at the price proposed would very injuriously affect his patrimonial interests.

I see no reason to doubt that an heir in possession, who has made a private contract in terms of these missives, with the approval of the other heirs of entail, and who is in a position to provide for all debts and charges affecting the estate, might obtain a ratification of the sale by proceeding under the Act of 1882. A purchaser in the position of the respondent has no concern with the application of the price and no interest in the particular form of procedure adopted, beyond seeing that it is reasonably calculated to serve the end of procuring the sanction of the Court without undue delay. But no such case occurs here; and one consideration is, to my mind, conclusive that, in the circumstances of the present case, the course which the appellant proposes to take is unwarranted; which is, that it practically adds a new and material term to the contract of sale, which is not to be found in the missives. It makes the efficacy of the contract depend, not, as stipulated, upon the ratification of the Court, but upon the joint approval, first of the Court, and then of the next heir of entail. Although the Court should be of opinion that the sale ought to be confirmed, it cannot pronounce an interlocutor to that effect if the next heir makes the statutory intimation that he desires the sale to be by public auction. It is, in my opinion, impossible to hold that the missives contemplate any proceeding for ratification, in which an expectant heir has the power, which he is likely to use, of putting an absolute veto upon the sale.

It was also argued for the appellant that the circumstances of this case do not entitle the respondent to a decree for specific performance, and that his remedy must be sought in an action for damages. We were informed that this plea was discussed before the learned judges in the Inner House, although it is not noticed in the judgments delivered by them. As I understood the argument, it was rested mainly on the grounds, that the kind of "ratification" contemplated in the missive was so ambiguous that the appellant in entering into the contract might fairly suppose he was not undertaking to buy out the next heir at the risk of great loss to himself, and also upon the impossibility, or, at least, the serious difficulty, of giving practical effect to a decree directing him personally to follow out a protracted course

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of action. No Scotch authority was cited, but the appellant relied on *Thomas* v. *Dering* (1). In that case a tenant for life, with remainder to his first and other sons in fee, with remainder to himself in fee, assuming that his trustees would give their consent, which they subsequently refused to do, contracted to sell the fee simple. The purchaser sought to enforce specific performance of the contract, to the extent of the life estate and remainder in fee, with an abatement; but Lord Langdale, M.R., dismissed his suit. Apart from the merits of the decision, which has been questioned by Lord St. Leonards (Vendors and Purchasers, 14 ed. page 309), the bare statement of the case is sufficient to shew its inapplicability here. It was there impossible for the vendor to give a title to the entire estate which he had contracted to sell, whereas it is within the appellant's power to do so, by simply using the machinery which the law supplies. It must also be observed that the remedy of specific performance of part of the contract, with a compensation, which has in many cases been given to a purchaser by English Courts of Equity, is unknown to the law of Scotland. That law rejects the actio quanti minoris, and its principle, for the reason apparently that to assess compensation to the purchaser for part of the estate sold, which the vendor has it not in his power to convey, would virtually be to make a new bargain for the parties which they had not made for themselves.

I do not think that upon this matter any assistance can be derived from English decisions; because the laws of the two countries regard the right to specific performance from different standpoints. In England the only legal right arising from a breach of contract is a claim of damages; specific performance is not matter of legal right, but a purely equitable remedy, which the Court can withhold when there are sufficient reasons of conscience or expediency against it. But in Scotland the breach of a contract for the sale of a specific subject such as landed estate, gives the party aggrieved the legal right to sue for implement, and, although he may elect to do so, he cannot be compelled to resort to the alternative of an action of damages unless implement is shewn to be impossible, in which case, loco

(1) 1 Keen, 729.

facti imprestabilis subit damnum et interesse. Even where implement is possible, I do not doubt that the Court of Session has inherent power to refuse the legal remedy upon equitable grounds, although I know of no instance in which it has done so. It is quite conceivable that circumstances might occur, which would make it inconvenient and unjust to enforce specific performance of a contract of sale; but I do not think that any such case is presented in this appeal. The fact that the construction of a term in the contract is attended with doubt and difficulty, evidenced it may be by the different meanings attributed to it by Courts or individual judges, ought not, in my opinion, to prevent its receiving its full legal effect, according to the interpretation finally put upon it by a competent tribunal. The argument that, in this case, a decree for specific performance would necessarily impose upon the appellant the duty of performing a long series of personal acts under the supervision of the Court does not appear to me to have a solid basis in fact. The acts which such a decree enjoins would be entirely within his power, and practically might be performed uno flatu, viz., by his signing a conveyance in favour of the respondent, and at the same time giving instructions to his agents to take the necessary steps for obtaining its approval by the Court.

The case stands at present in this position: the Lord Ordinary ordained the appellant to implement the contract, and forthwith to present an application to the Court in the form to which I first referred "or otherwise to make such application to the Court in terms of the Entail Acts as shall entitle him to carry out and implement the said contract." Seeing that the appellant has not suggested any alternative except one, which in the opinion of the House he is not entitled to adopt, the latter part of the Lord Ordinary's decerniture does not seem to be necessary. His interlocutor so far as it relates to the mandatory conclusions of the action was recalled, but hoc statu only, by the Lords of the First Division, who at the same time appointed a draft disposition to be lodged, which they are or were in course of adjusting. I think their Lordships acted rightly in proceeding to settle the terms of the conveyance before making an order for

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its execution, or for procedure being taken with a view to its approval.

For these reasons I concur in the judgment which has been moved.

LORD MACNAGHTEN:—

My Lords, the only question in this case, as it seems to me, is what is the true construction of one expression in the letter of the 19th of September, 1888, which contains the offer of the Murtly estates to Mr. Kennedy.

The argument of counsel ranged over a much wider field—and objections were taken to the decree under appeal for which no foundation was laid in the appellant's pleas in law. It was contended, that whatever construction may be placed on the expression in question the agreement between the appellant and Mr. Kennedy is not an agreement of which the Court can decree specific performance, because it involves, as it was said, a continuous series of acts which it is impossible for the Court to superintend. I do not think that there is any substance in this objection. Apart from the steps necessary in order to obtain "the ratification of the Court," whatever be the true meaning of that expression, there is nothing required of the vendor but what is ordinarily incident to the carrying out of a decree for the specific performance of a contract for the sale of real property. In another branch of their argument the learned counsel for the appellant contended that if the purchaser's construction be adopted the procedure would be purely formal, and that the ratification of the Court would be a matter over which the vendor would have complete control. In that view it is difficult to see the objection to a decree for specific performance. But whether the purchaser's construction or that suggested by the vendor be accepted, I think it is quite clear that the acts required on the part of the vendor to complete the sale are not of such a character as to make a decree for specific performance improper. I may add, that it seems to me that the old cases in Chancery cited by Mr. Rigby, where in suits for specific performance a defendant has been ordered to levy a fine, are not without some

bearing on this part of the argument so far as it was founded upon English authorities.

It was then contended that even if the purchaser's construction be accepted it would be wrong to order the vendor to perform the agreement specifically if he avers and proves that his understanding of the contract was different. In support of this view, several English authorities were referred to. It cannot be disputed that the Court of Chancery has refused specific performance in cases of mistake when the mistake has been on one side only; and even when the mistake on the part of the defendant resisting specific performance has not been induced or contributed to by any act or omission on the part of the plaintiff. But I do not think it is going too far to say that in all those cases—certainly in all that have occurred in recent times—the Court has thought, rightly or wrongly, that the circumstances of the particular case under consideration were such that (to use a well-known phrase) it would be "highly unreasonable" to enforce the agreement specifically. The Court will not be active in assisting one party to an agreement who has always his remedy in damages to take advantage of the mistake of the other so as to involve him in serious and unforeseen consequences. In the present case, I do not think there is anything unreasonable in holding Sir Douglas Stewart to his bargain. No English decision was cited which lends any colour to the suggestion that if this question had arisen in England specific performance would be refused. But I must say that I think the Lord Advocate was well founded in his observation, that even if any such case could be produced it would be no guide to the decision of the present question. In England, the remedy of specific performance is an extraordinary remedy. It is a matter of discretion, and defences are admitted which are inadmissible according to the doctrines and practice of the Courts of Scotland, where specific performance is part of the ordinary jurisdiction of the Court.

I now come to the real question in dispute,—What is the meaning of the expression "subject to the ratification of the Court," as used in the letter of the 19th of September, 1888?

It was common ground that both parties were aware that the

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estate was entailed. Now, by the law of Scotland, as it has existed since 1882, there are two ways in which an heir of entail in possession may have the entailed estate sold. Under the Rutherfurd Act (1), as amended by subsequent legislation, an heir of entail may execute a deed of conveyance to an intending purchaser, and then apply to the Court for its sanction to the sale. On being satisfied that due provision has been made for the burthens on the estate, if any, and for the interests of the succeeding heirs or heir in tail, as the case may be (the value of such interests being ascertained by the Court in case the parties differ), and on being satisfied that the procedure is regular and in conformity with the provisions of the Acts, the Court is bound to pronounce an interlocutor approving the sale. That approval gives validity to the conveyance.

The Act of 1882 also contains a separate set of provisions wholly independent of the Rutherfurd Act, under which, on the application of the heir of entail, the entailed estate may be converted into entailed money. But under those provisions the Court is bound to investigate the propriety of the proposed transaction, and the next heir of entail has an absolute right to require that the sale shall be by public auction.

To which of those two modes of procedure does the letter of the 19th of September, 1888, more properly point? The word "ratification" is not to be found either in the Act of 1882 or in the earlier Acts. In the Rutherfurd Act, and in the amending Act of 1853, we find these expressions: "The Court shall interpone their authority," and "the Court shall pronounce an interlocutor approving" the sale.

Now it is to be observed that that which is to be "subject to the ratification of the Court" is the sale—not the agreement. The writer of the proposal for sale declares that on acceptance within a specified time the offer "will be binding" upon him, but "the sale is made subject to the ratification of the Court." It was objected that the term "ratification" implies at least a power of rejection, and that the Court cannot properly be said to "ratify" when its action is merely formal. But the same objection might have been urged with even greater force if the word used had

(1) 11 & 12 Vict. c. 36.

been "approval," and yet the legislature itself speaks of the Court "approving" a sale under the Rutherfurd Act. I think that the word "ratification" simply means confirmation. It seems to me that that is the proper and ordinary signification of the word and the sense in which it is used in the letter of the 19th of September, 1888.

On the other hand, I do not think that the word "ratification," as used in the letter of the 19th of September, is properly applicable to proceedings under the Act of 1882. I do not say that a pre-arranged sale may not be carried out under that Act with the consent and concurrence of the next heir of entail. But even then, strictly speaking, the Court would not be ratifying a sale under a subsisting agreement, though it might be sanctioning a sale on precisely the same terms. But if the next heir of entail refuses his consent and insists upon a sale by public auction, the agreement is at an end—neither party is bound—the whole matter is at large.

Then it was said that there was an application on the part of the appellant, which was still pending, to have the entailed estate converted into entailed money, and that, therefore, the appellant must have been referring to those sections of the Act of 1882, under which that application was made. Very likely the appellant had some idea, more or less indistinct, of the powers of the Court under those sections. But it is impossible to suppose that at the time he made his offer to Mr. Kennedy he had present to his mind the actual provisions of the statute, and that he contemplated the intervention of the next heir of entail. If he had that in contemplation—if by the expression "subject to the ratification of the Court" he really meant "subject to the consent of the next heir of entail," which is what this argument comes to, all I can say is that his offer was very misleading. But I acquit Sir Douglas Stewart of any intention to mislead, for I find by his letter of the 20th of October he says that he was surprised—and I have no doubt he was honestly surprised—to learn that in the proceedings which he then had distinctly in view the next heir of entail was entitled to appear and to prevent a sale by private bargain.

In the result I am of opinion that the interlocutors appealed

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from are right, and that the appeal must be dismissed with costs.

Interlocutors appealed from affirmed, and the appeal dismissed with costs.

Lords' Journals, 17th February, 1890.

Agents for the appellant: *Loch & Goodhart, for Dundas & Wilson, C.S., Edinburgh.*

Agents for the respondents: *Grahames, Currey, & Spens, for Tods, Murray, & Jamieson, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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SIR A. D. STEWART, BART . . . . . APPELLANT;

AND

J. S. KENNEDY AND ANOTHER (REDUCTION) RESPONDENTS.

APPEAL No. 2.

Contract—Sale of Entailed Estate—Reduction—Essential Error induced by Misrepresentation—Issues for Trial.

An error entertained by one of the parties to a contract of sale as to the legal meaning of the contract is not by itself sufficient to invalidate his consent to the contract.

The appellant made the respondent an offer of his entailed estates at a certain price by a letter which contained this stipulation, "The sale is made subject to the ratification of the Court." The offer was accepted. This offer and acceptance, according to their proper construction, constituted an absolute and unconditional sale of the entailed estates. In an action by the appellant of reduction of the letter of offer the Court of Session granted him an issue of facility and circumvention only. He asked for one other issue, either the second of essential error, or the third of essential error, induced by the respondent's agent, or the fourth of essential error, induced by fraudulent representations. He alleged the respondent's agent gave him a draft of the offer, to copy and sign as his own letter, representing that the effect of writing the letter would be "merely to give to him" (the appellant) "a little hold on" the respondent; and that he was not aware of any mode of selling an entailed estate except under the Act of 1882, under which the Court judged of the sufficiency of the price:—

Held, affirming the decision of the Court of Session (16 Court Sess. Cas. 4th Series, 857), that the appellant could not claim to have the contract

reduced merely because he understood it to be other than it really was, and therefore he was not entitled to the second issue.

But *held*, reversing the decision of the Court of Session, that the appellant's averments did relevantly raise the matter of representation by the respondent's agent, and therefore he was entitled to the third issue.

APPEAL from the First Division of the Court of Session (1), which affirmed the judgment of the Lord Ordinary (Lord Kinnear).

This was the sequel to the case reported ante, p. 75.

In consequence of the construction of the offer of the 19th of September, 1888, the appellant relied on in that action having been given against him, he raised this action against the respondent, Mr. Kennedy, for reduction of the contract. He proposed the following issues for trial before a jury:—

(1) Whether, on or about the 19th of September, 1888, the appellant was weak and facile in mind and easily imposed upon; and whether Peter Glendinning, of the Leuchold, Dalmeny Park, taking advantage of the said weakness and facility, did, by fraud or circumvention, impetrate and obtain from the appellant the letter of the 19th of September, 1888, to his lesion;

(2) Whether in granting the said letter the appellant was under essential error as to its import and effect;

(3) Whether in granting the said letter the appellant was under essential error as to its import and effect, induced by the said Peter Glendinning;

(4) Whether in granting the said letter the appellant was under essential error as to its import and effect, induced by fraud and fraudulent representations made by the said Peter Glendinning;

(5) Whether there was mutual essential error.

If the appellant were given—in addition to the first issue which the Court of Session has given him, and against which there is no appeal—the second issue, then he did not ask for the others; or if not the second, then if he were given the third, he did not ask for the fourth or fifth.

The appellant's averments as to the circumstances under which he signed the letter of offer were shortly these, as set out in his

(1) 16 Court Sess. Cas. 4th Series, 857.

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record (cond. 2–6):—That early in the month of July, 1888, the appellant received a letter from Peter Glendinning, desiring to know, "in the interest of an American gentleman," whose name he did not disclose, whether the appellant entertained any idea of selling all or any of his estates. The appellant was not unwilling, if a price should be offered of which he and his legal advisers approved, to convert his entailed estates into money, according to the procedure authorized by the Act of 1882. And that the appellant had presented to the Court, in 1885, a petition for an order of sale under that Act, and there had been a report to two valuators, who suggested the upset price of £404,000.

The appellant wrote to Mr. Glendinning he would be glad to see him, and he came to Murtly and saw the appellant on the 13th of July, 1888.

On the 18th of September the respondent, Mr. Kennedy (whom the appellant then saw for the first time), and Mr. Glendinning came to Murtly, and were shewn over the estates.

On the 19th of September, 1888, Mr. Glendinning unexpectedly arrived at Murtly Castle, where the appellant and Lady Stewart were alone. The appellant was at and about this time an infirm old man, suffering from illness, and in a nervous and excitable condition; owing to his physical and nervous state, as well as to his advanced age (over eighty), his mind and will were not in a good state of control. Mr. Glendinning, taking advantage of these circumstances, and acting as agent for or on behalf of Mr. Kennedy, did, by undue pressure or solicitation and by fraud or circumvention, impose upon the appellant, and obtain from him the letter in question. Mr. Glendinning, after expressing regret that Mr. Kennedy had been disappointed with the estates, and had not made an offer, and enlarging on the advantages to the appellant of such a sale, suddenly produced from his pocket a draft letter which he earnestly pressed the appellant to copy in his own handwriting, and to sign as his own letter. He represented to the appellant that the matter was urgent, and would brook no delay. The appellant was unwilling to do so, but ultimately, being ill, nervous, and excited, he yielded to the pressure put upon him by Mr. Glendinning, and copied out the

draft letter, and signed it. Mr. Glendinning put it in his pocket, and left Murtly.

(Cond. 7.) Throughout the negotiations for a sale of the estates, and in his interview with Mr. Glendinning, the appellant had in his mind the method of sale with which he was already acquainted, namely, the conversion of the estates into a fund of entailed money under the procedure prescribed by the Act of 1882. Mr. Glendinning was well aware that the appellant had presented a petition under that Act, and that he was thus acquainted with its general scope and purpose. The appellant was not aware of any other mode of selling an entailed estate, and it never entered his thoughts that he might be committing himself to sell the estates on the footing of paying compensation to the next heir or heirs of entail.

Mr. Glendinning at the said interview represented to the appellant that the effect of writing the said letter would be merely to give to the appellant a little hold on Mr. Kennedy, in the event of his accepting its terms. Mr. Glendinning thereby induced the appellant to believe that the result of the acceptance by Mr. Kennedy of the offer contained in the said letter would be a conditional bargain; that the appellant would be bound to go to the Court for authority to sell the estates, under the procedure which he knew of, to Mr. Kennedy, and if the Court should approve of the whole terms of the proposed bargain as fair and reasonable, and should ratify the same, that Mr. Kennedy would be bound to purchase on the same terms; but that if the Court should hold that the price was inadequate the appellant would not be bound to sell at the price proposed. The appellant was induced to believe, and did believe, that the whole matter would, on Mr. Kennedy's acceptance, be still open for investigation and consideration on the application to the Court, and that he might obtain the advice of his law agents as well as the protection of the Court.

(Cond. 8.) The appellant, when he wrote out and signed the said letter, was under essential error as to its meaning and effect, and said error was induced by the representations made to him by Mr. Glendinning. The said representations were false and fraudulent. Or otherwise Mr. Glendinning believed

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that the meaning and effect of the said letter were such as the appellant believed, and was induced by Mr. Glendinning to believe them to be; in which case the appellant avers that the contract embodied in the said letter, and the defender's reply thereto, was entered into under mutual essential error on the part both of the appellant and defender as to its tenor and effect.

The Lord Ordinary (Lord Kinnear) on the 28th of May, 1889, approved of the first issue; but held that the remaining issues proceed on the assumption that the issue of facility and fraud or circumvention has been negatived, and on that assumption there was no relevant averment of error.

The First Division of the Court of Session, on the 25th of June, 1889, adhered. The Lord President (Inglis) and Lords Mure and Adam were of opinion that the appellant should only be allowed the first issue; but Lord Shand dissented, considering he should have the second issue also.

On appeal,

Feb. 27. *The Dean of Faculty* (*J. B. Balfour*, Q.C.), *Finlay*, Q.C (with them Sir *Horace Davey*, Q.C., and *Dundas*, of the Scotch Bar), for the appellant:—

The issue of essential error is a well-known course of procedure in an action for reduction. The error founded upon must be essential. Here the error is of the nature of the contract.

For what this House has held to be the true reading of the contract is that it was an absolute sale, which is essentially different from what the appellant had in his mind, and whether a contract is absolute or subject to an important suspensive condition is of the nature of the contract.

Professor Bell in his Principles, vol. 1 (8th ed.), sect. xi., says, "Error in substantials, whether in fact or in law, invalidates consent (or rather excludes real consent), where reliance is placed on the thing mistaken. Such error in substantials may be: (1) In relation to the *subject* of the contract or obligation; as when one commodity is mistaken for another; (2) In relation to the *person* who undertook the engagement, or to whom it is supposed to be undertaken, wherever personal identity is essential; (3) In

relation to the *price* or consideration for the undertaking; (4) In relation to the *quality* (quantity or extent) of the thing engaged for, if expressly or tacitly essential to the bargain; or, (5) In relation to the *nature* of the contract itself supposed to be entered into (as, for example, if one sign a conveyance believing it to be a bond or security or a testamentary deed, or a bill believing it to be a guarantee, or even a deed under the mistaken belief induced by the other party that it contains material clauses which were in the draft, or does not contain clauses which are concealed or improperly added afterwards."

Where there is in the purchaser's mind a merely formal consent by the Court, and in the vendor's the belief that the whole of the questions involved in the contract were to be subject to the discretion of the Court, and that he would thereby obtain the protection which he had not, owing to his entering into the contract without adequate advice; there is no consensus in idem placitum, and that is enough for essential error. If therefore the appellant can convince a jury that he had that in his mind which he says he had, that is sufficient to invalidate the contract.

Error on the part of the appellant alone is sufficient for an issue of essential error. There is no doubt the Court is not absolutely bound to grant such an issue in every case where a person says, "I misunderstood the contract as now interpreted," for the contract may be such that a party cannot be heard to say he misunderstood. But it is different where there is ambiguity of so serious and vital a nature as in this contract. Essential error has reference to the quality of the error, not to how it is brought about; therefore proof of the appellant's ignorance is enough, and under such an issue it is not necessary to prove inducement. Such an issue of essential error may be granted in respect to gratuitous, or in respect to onerous contracts: and here the appellant is attempting to set aside the letter written as an offer, which was not a contract until accepted, and therefore in truth it was a gratuitous document. There is no doubt the cases are not numerous where error by one party, not caused by the other, has been allowed as an issue of essential error.

In *M'Conechy* v. *M'Indoe* (1), the Lord Justice Clerk said: "The

(1) 16 Court Sess. Cas. 2nd Series, at p. 316.

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facts averred in this record of the manner in which the pursuer was urged to sign the deed without being allowed time to consult with her friends clearly indicates the defender as the party responsible for the error. *Johnston* v. *Graham* (1) is an authority that, short of active inducement, there may be elements justifying and excusing ignorance and sanctioning the issue of essential error. In *Wemyss* v. *Campbell* (2) there was a kind of misrepresentation, the property being advertised unwarrantably as a deer forest; but the issue sent to trial was whether there was essential error. *M'Laurin* v. *Stafford* (3) shews that it is enough to have the issue essential error without the addition of the word "induced" by the defender. An issue of essential error was also allowed in *Purdon* v. *Rowats' Trustees* (4).

Assuming that it is held that the appellant is not entitled to the second issue, then he ought to have the third issue.

The appellant's averments are sufficient. They were (inter alia) that the letter of offer was a copy of one produced by the respondents' representative, Mr. Glendinning. He knew the estates were entailed estates, and was aware that the appellant had lodged a petition for sale under the Act of 1882. And on the date of the letter of offer he represented to the appellant that the effect of the letter would "be merely to give him a little hold on Mr. Kennedy" if he accepted. That was admittedly a false, though it may have been an innocent, representation, because the construction of the Courts is that the effect of the letter of offer is to give Mr. Kennedy a complete hold on the appellant. Therefore if the jury were convinced the appellant was induced to enter into the contract on that representation by the agent of the other side, it would, both in England and Scotland, be sufficient to rescind the contract.

The fourth issue went to this. Supposing Mr. Glendinning knew the Act of 1882 was not the one under which the contract would be completed, then his representation was more than misrepresentation—it was equal to fraud.

(1) 18 Court Sess. Cas. 2nd Series, 1234; 28 Scottish Jurist, 624.

(2) 20 Court Sess. Cas. 2nd Series, 1090.

(3) 3 Court Sess. Cas. 4th Series, 265.

(4) 19 Court Sess. Cas. 2nd Series, 206.

The Lord Advocate (*J. P. B. Robertson*, Q.C.), and *Rigby*, Q.C. (with them *A. G. Murray*, of the Scotch Bar), for the respondents:—

The judgment of the Court of Session ought to be affirmed. The law will not allow the issue of essential error to one party to an onerous contract, on the ground merely that he has mistaken the contract, even though the mistake be serious and vital. It would lead to endless litigation. For a party might gain on the construction of the contract and lose again on an issue of essential error. No one of the cases cited sustain the appellant's proposition. The materiality of these cases depends for this purpose on the initial stage before the issues were settled; but *Wemyss* v. *Campbell* (1) is the only one reported at that stage. *M'Laurin* v. *Stafford* (2) was apparently a case of a gratuitous deed, and in such there is nothing to make out but error. *M'Conechy* v. *M'Indoe* (3) was the same. In *Johnston* v. *Graham* (4) Lord Deas says: "The error was *induced* by the acts of the defender." Therefore there there was clearly misrepresentation. In old cases essential error induced by representation has been tried under the issue of essential error, but it would not be now. In *Purdon* v. *Rowats' Trustees* (5) the grantor of the deed thought he had only the claims he discharged, whereas he had others of which he was ignorant. Here the contract is certain as to the lands, person, and price, and the only view was whether there was to be a reconsideration of the price; therefore the mistake was not of the nature of the contract.

The third issue turns on a single sentence attributing to Mr. Glendinning the representation that the letter of offer would give a little hold on Mr. Kennedy. That is an enormous gloss to put upon that statement.

As to the fourth issue. The first issue is a good general allegation of fraud. It is weakness and lesion, on which fraud can be postulated.

(1) 20 Court Sess. Cas. 2nd Series, 1090.
(2) 3 Court Sess. Cas. 4th Series, 265.
(3) 16 Court Sess. Cas. 2nd Series, 315.
(4) 18 Court Sess. Cas. 2nd Series, at p. 1239; 28 Scottish Jurist, 624.
(5) 19 Court Sess. Cas. 2nd Series, 206.

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The Dean of Faculty, in reply:—

The appellant knew of the procedure under the Act of 1882, and was ignorant of that under the Act of 1853. If Mr. Glendinning agreed with the appellant and did not know of the Act of 1853, there is no use charging him with fraud.

What the appellant has alleged in support of the third and fourth issues could have been represented to a man held not to be facile, so that if the jury found that the appellant was not facile at the date of the offer, the appellant ought to have either the second or the third or the fourth issue.

Judgment after consideration.

March 10. LORD HERSCHELL:—

My Lords, by this action the appellant, Sir Archibald Douglas Stewart, who is heir of entail in possession of the estate of Murtly, seeks to reduce an alleged contract for the sale of this and other estates to the respondent Mr. Kennedy.

The record having been closed, the Lord Ordinary proceeded to adjust the issues to be tried. The pursuer, who is the appellant at your Lordships' Bar, proposed five issues for trial. Of these the Lord Ordinary only approved of the first, viz., whether on or about the 19th of September, 1888, the pursuer was weak and facile in mind and easily imposed upon, and whether Mr. Peter Glendinning, of the Leuchold, Dalmeny Park, taking advantage of the said weakness and facility, did by fraud or circumvention impetrate and obtain from the pursuer the letter dated the 19th of September, 1888, to his lesion? The Inner House affirmed the interlocutor of the Lord Ordinary, concurring with him in the rejection of the other issues (1).

The second issue proposed was in these terms: "Whether in granting the said letter the pursuer was under essential error as to its import and effect?" The first question which your Lordships have to consider is whether this issue ought to be allowed. The appellant avers that he understood and intended the contract to impose on him the obligation to sell only in case the Court approved of the terms, and upon application made under the

(1) 16 Court Sess. Cas. 4th Series, 855.

Entailed Estates Act of 1882 ordered a sale at the price and upon the conditions specified in the letter of the 19th of September, 1888. Your Lordships have held that this is not the true construction of the contract between the parties, and that it imposed an absolute obligation to sell on the terms contained in the letter, and to take the requisite steps under other provisions of the Entailed Estates Acts to carry out the contract. Under these circumstances, the appellant insists that there was essential error entitling him to have the contract reduced.

The majority of the learned judges in the Court of Session have held, as I understand their judgments, that even if the appellant did understand and intend the contract to be that which he alleges, the error was not in the essentials of the contract. The Lord President said (1): "The essentials of this contract are the identification of the parties contracting, the subject sold, and the amount of the price, and as regards these in the present case there is no room for doubt. The parties are certainly ascertained, the lands are sufficiently described in the missives, and the price is twenty-five years' purchase of the existing rental. As to the application of the price the purchaser has no interest or concern; and nothing can be an essential of a contract which does not concern both the parties." Again, Lord Adam says: "I have always understood that the essentials of a contract of sale are three, viz., the person, the subject, and the price. If there is no error on these three points, then I understand there can be no relief against such a contract." And later on, after stating the nature of the error insisted on, he says: "That is the error he avers, and from which he wants relief. Now, that is not an error which, to my mind, goes to the essentials of the contract at all. It appears to me to be simply this, that Sir Douglas Stewart understood that the price of from £300,000 to £400,000 should be disposed of in a particular way. Now, Mr. Kennedy, the defender, the other party to the contract, has no concern with the application of the price, and therefore I cannot see how that can be an essential of the contract."

On the best consideration I have been able to give to the matter, I am not prepared to dispose of the case upon these

(1) 16 Court Sess. Cas. 4th Series, 857.

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grounds. It appears to me that the error, if it existed, was one which affected the substance of the contract. To agree to sell in any event at a price fixed appears to me to be one thing; to agree to sell at that price only in case the Court, upon a consideration of all the circumstances, should come to the conclusion that the estate ought to be sold at that price, appears to me to be quite another thing. I think it is a fallacy to say that the difference affected only the application of the purchase-money—whether it was to be settled in the same way as the entailed estate, or divided between the life-renter and the next heir. It went really deeper than this. It affected both parties to the contract, for it concerned them both whether the sale was to be an absolute one or to take effect only if the Court were so well satisfied that the price and other conditions were proper as to order a sale on those terms. And I cannot say that the alleged error was one which did not touch the price, inasmuch as it involved the question whether there was to be a sale at that price absolutely, or only if the Court approved of it.

But assuming that the suggested difficulty does not stand in the appellant's way, and that the error averred is in the essentials of the contract, the question remains whether he is entitled to have the contract reduced merely because he understood and intended it to be other than it really was, that misunderstanding not having been induced by the conduct of the other party. The contention of the appellant is certainly a sufficiently startling one. He made the respondent an offer, which all the Courts, including the tribunal of ultimate appeal, have held to bear a certain construction. This offer the respondent accepted. And now it is sought to reduce the contract simply on the ground that the appellant did not intend to make the offer which the Courts have held that he did make. Such a contention is far-reaching in its consequences. It would apply in every case where the parties differed in their construction of an essential part of the contract. After litigating the matter through all the Courts without success, it would always be open to the defeated litigant to reduce the contract, provided he could shew that he understood the contract to bear the interpretation for which he had contended.

Unless it can be distinctly shewn that this has been held to be the law of Scotland, I am not prepared to yield to the argument urged on behalf of the appellant. The consequences of so doing would, I think, be most mischievous. As the Lord President said in the present case: "If this plea were listened to, every litigant who is unsuccessful in a question as to the construction and effect, or, to use the pursuer's own words, 'the import and effect,' of a contract, could at once have the remedy of reducing the contract which he had deliberately made and afterwards persistently misconstrued."

No authority was cited in which such a claim has been given effect to. Much reliance was placed upon the passage in Bell's Principles (1), where it is said that "Error in substantials, whether in fact or in law, invalidates consent where reliance is placed on the thing mistaken." It was urged that this proposition was stated broadly without limitation. But this is a mere general statement of the law of essential error, and cannot, I think, have the extensive application given to it which the appellant desires. The fact that innumerable contracts have been made, and that countless controversies have arisen as to their construction in essential particulars, and that yet no case can be pointed to in which the Courts have given relief upon the ground now under consideration, satisfies my mind that it cannot be the law of Scotland. The authorities cited, when carefully examined, tell in my opinion against the appellant. They shew, I think, that in the case of bilateral obligations it was always considered essential that the error which was sought to be taken advantage of by one party to reduce the contract should have been induced by the other party to it. It is true that in some instances an issue has been allowed in the same terms as that now under discussion. But the case set up by the pleadings and intended to be tried under them was that there had been essential error induced by the misrepresentation of the other party to the contract.

The only other point which has to be dealt with is whether there are relevant averments in the 7th and 8th condescendences entitling the appellant to a trial of the third of his proposed issues, viz., "Whether in granting the said letter the pursuer was

(1) Vol. i. sect. 11.

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under essential error as to its import and effect, induced by the said Peter Glendinning." I have entertained upon this point considerable doubt, but I have arrived ultimately at the conclusion that the issue ought to be allowed. I must not be understood as indicating an opinion that the proper inference from the facts stated is that the error into which the pursuer alleges that he fell was induced by Glendinning. Upon that I express no opinion one way or the other. All that I intend to determine is that the pursuer is entitled to have the question submitted for trial by the jury.

I therefore move your Lordships that the interlocutors of the 28th of May and the 25th of June, 1889, be reversed in so far as they disallow the third issue proposed by the pursuer, and the said interlocutor of the 25th of June in so far as it finds the defenders entitled to expenses, and that the cause be remitted with directions to allow the said issue and to find neither party entitled to expenses of adjustment in the Inner House. The appellant having failed on the most substantial point submitted to the House, I think there ought to be no costs of the appeal to your Lordships' House.

LORD WATSON :—

My Lords, this is an action brought for the purpose of reducing and setting aside a contract for the sale of the entailed estate of Murtly, contained in missives of offer and acceptance, by the appellant and respondent. In a separate action, at the instance of the respondent (the purchaser), for implement of the contract, your Lordships recently affirmed (1) a judgment of the Court of Session, construing, adversely to the appellant, a stipulation in his letter of offer, to the effect that, in the event of its acceptance, the sale was "made subject to the ratification of the Court."

The reduction proceeds on the footing of the construction which your Lordships adopted, and five grounds of rescission are stated by the appellant. [His Lordship read them.]

The learned judges of the First Division (2) unanimously allowed the appellant an issue of fraud and circumvention, in

(1) See ante, p. 75. (2) 16 Court Sess. Cas. 4th Series, 857.

usual form; and so far the parties acquiesce in their decision. The appellant pressed for a second issue of essential error, failing which, for an issue of error induced by misrepresentation, and failing that, for an issue of error induced by fraudulent misrepresentation. The majority of the Court refused to grant an issue upon any of these grounds. Lord Shand dissented, being of opinion that the appellant was entitled to a simple issue of "essential error."

I find myself in the position of being unable to accept, without considerable reserve, the views of the majority of the Court, if I understand them aright; whilst I am constrained to differ from the opinions expressed by Lord Shand with respect to the issue of essential error which his Lordship was prepared to allow.

I concur with all their Lordships as to the accuracy of the general doctrine laid down by Professor Bell (Bell's Prin., sec. 11), to the effect that error in substantials, such as will invalidate consent given to a contract or obligation, must be in relation to either—(1) its subject-matter; (2) the persons undertaking or to whom it is undertaken; (3) the price or consideration; (4) the quality of the thing engaged for, if expressly or tacitly essential; or (5) the nature of the contract or engagement supposed to be entered into. I believe that these five categories will be found to embrace all the forms of essential error which, either per se or when induced by the other party to the contract, give the person labouring under such error a right to rescind it. In the present case no error is alleged, except in reference to the nature of the contract of sale constituted by the missives in question; and it is not averred that the same error was entertained by the respondent, or his representative, Mr. Glendinning.

Professor Bell does not, in his useful treatise, deal with the important question, how far, in the case of contracts and onerous unilateral obligations, an erroneous belief, entertained by one party only, will give him a right to rescind. Without venturing to affirm that there can be no exceptions to the rule, I think it may be safely said that, in the case of onerous contracts reduced to writing, the erroneous belief of one of the contracting parties, in regard to the nature of the obligations which he has undertaken, will not be sufficient to give him the right, unless such

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belief has been induced by the representations, fraudulent or not, of the other party to the contract.

The Lord President (Inglis), in his judgment, after referring to various kinds of error which are not alleged by the appellant, goes on to say (1): "Neither is there any error as to the nature of the contract, as in the case of a person signing a disposition believing it to be a lease, or a bond for borrowed money believing it to be a testament. The parties well knew they were making a contract of sale and nothing else." If his lordship merely intended to affirm that the error alleged by the appellant was not, of itself, a good legal ground for setting aside the contract of sale, I should not disagree with him. But the terms of his judgment are calculated to suggest that such error as is alleged can in no case constitute error in substantialibus, and that the proposition which I have quoted was sufficient ground for disallowing all the issues proposed by the appellant. Lords Mure and Adam appear to have been of the same opinion. At any rate, I cannot find, in the judgments delivered by the majority, any expression of opinion with reference to the legal effect of the alleged error, when coupled with the appellant's allegations to the effect that it was induced by misrepresentation.

Lord Shand held, I think rightly, that the error averred by the appellant is "error in substantials," within the meaning of that phrase as used by Professor Bell. I cannot read the words "nature of the contract itself" in the limited sense which the Lord President appears to have attached to them. The nature of the contract involves, in my opinion, far wider considerations than that of the legal category to which the contract is assigned by lawyers. One contract of sale may differ as essentially from another (apart from all considerations of subject, persons, price or quality of subject) as a contract of sale does from a contract of pledge or lease. And I venture to think that an absolute contract to execute a conveyance of an entailed estate, and then to obtain its approval by the Court, is, in its very nature, different from a conditional contract to sell the same estate for a fixed price if, in an application for an order of sale under the Act of 1882, the Court shall sanction a private sale at that price, and

(1) 16 Court Sess. Cas. 4th Series, 857.

the next heir of entail does not exercise his power of forbidding the bargain.

But Lord Shand goes a great deal further than holding that the appellant's error, with reference to the nature of the contract of sale, was an error in substantials. He expresses the opinion that the mere existence of such an erroneous belief in the mind of the appellant affords a sufficient ground for annulling the contract. So far as I can judge, his opinion rests upon the inference or assumption that in such a case there cannot be that duorum in idem placitum consensus atque conventio which is necessary to the constitution of a mutual contract. To give any countenance to that doctrine would, in my opinion, be to destroy the security of written engagements. In this case, I do not think it has any foundation in fact. By delivering his missive offer to Mr. Glendinning, the appellant represented to the respondent that he was willing to be bound by all its conditions and stipulations, construed according to their legal meaning, whatever that might be. He contracted, as every person does who becomes a party to a written contract, to be bound, in case of dispute, by the interpretation which a court of law may put upon the language of the instrument. The result of admitting any other principle would be, that no contract in writing could be obligatory if the parties honestly attached, in their own minds, different meanings to any material stipulation. As soon as one of them obtained the final judgment of a competent Court in favour of his construction, the other would be at liberty to annul the contract. It is a significant fact that, although Courts are constantly resorted to for their decision on the conflicting views of parties as to the meaning of their written contracts, and not unfrequently interpret them in a sense contemplated by neither of the litigants, not a single case has been cited in which it has been attempted to void a contract on that ground.

I am of opinion that the alleged error of the appellant is, by itself, insufficient to invalidate his consent; but that it will be sufficient for that purpose if it can be shewn to have been induced by the representations of the respondent, or of any one for whose conduct he is responsible. Whether the appellant is entitled to an issue raising the matter of representation chiefly

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depends upon the relevancy of his averments in the seventh article of his condescendence. Had his averment as to the particular representation made by Mr. Glendinning stood alone, I should have hesitated to hold that it was sufficient. But, having regard to the other allegations made on record with respect to the actings of Mr. Glendinning, and to the knowledge imputed to him of the petition which the appellant had presented to the Court, I have come to the conclusion that an issue of essential error induced by Mr. Glendinning ought to be allowed. If the surrounding circumstances are established, the question will arise, whether the representation imported that the effect of the offer, when accepted, would be to give the appellant a little hold on the respondent, whilst it did not absolutely bind the appellant himself. These are matters well fitted for the consideration of a jury, and I purposely abstain from further observation upon them.

I concur in the judgment which has been moved by my noble and learned friend on the Woolsack.

LORD MACNAGHTEN concurred.

Ordered, that the interlocutors of the 28th of May and the 25th of June, 1889, in so far as they disallow the third issue proposed by the pursuer, be Reversed: And the said interlocutor of the 25th of June, in so far as it finds the defenders entitled to expenses, be Reversed. Cause remitted with directions to allow the said third issue, and to find neither party entitled to expenses of adjustment in the Inner House. And to proceed in the Cause as may be lawful and necessary:

Further ordered, that there be no costs of the appeal to this House.

Lords' Journals, 10th March, 1890.

Agents for appellant: *Loch & Goodhart, for Dundas & Wilson, C.S., Edinburgh.*

Agents for respondents: *Grahames, Currey, & Spens, for Tods, Murray, & Jamieson, W.S., Edinburgh.*

[HOUSE OF LORDS.]

TANCRED, ARROL & CO. . . . . APPELLANTS;

AND

THE STEEL COMPANY OF SCOTLAND, LIMITED . . . . . RESPONDENTS.

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Arbitration—Agreement to refer—Arbiter not expressly named—Delectus personæ—Words "more or less," construction of.

By the law of Scotland, an agreement to refer future disputes, if and when they shall arise, to a person unnamed, and designated only by his filling a particular office or position, is not binding. And the parties entering into such an agreement must be held to have contracted on the footing of this rule.

By agreement in writing between the pursuers and the defenders the pursuers agreed to supply "the whole steel" required for the Forth Bridge, less 12,000 tons of plates, subject to the conditions herein contained, at certain prices. The conditions contained these clauses: "The estimated quantity of steel we understand to be 30,000 tons, more or less." "Any question that may arise as to the meaning or intent of this contract to be settled in the case of difference by the engineer of the Forth Bridge for the time being, whose decision shall be binding upon both parties":—

Held, affirming the decision of the Court of Session (15 and 16 Court Sess. Cas. 4th Series, 215 and 440), first, that the arbitration clause was not binding; secondly, that the pursuers were entitled to supply the whole of the steel required for the bridge, and that their right was not qualified or affected by the statement that the estimated quantity which would be required was understood to be "30,000 tons, more or less."

APPEAL from judgments of the First Division of the Court of Session, Scotland (1), affirming in part interlocutors of the Lord Ordinary, Lord Trayner.

The action was raised at the instance of the respondents, the Steel Company of Scotland, against the appellants, Messrs. Tancred, Arrol & Co., the contractors for the Forth Bridge at Queen's Ferry, to have it found that the respondents were entitled to supply, and the appellants were bound to take from the respondents, all the steel required for the Forth Bridge other than 12,000 tons at a certain price, in accordance with their contract, which was constituted by letters, or otherwise that the appellants ought to pay damages for having supplied themselves elsewhere.

(1) 15 and 16 Court Sess. Cas. 4th Series, 215 and 440 respectively.

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The respondents, in their letter of offer, dated the 27th of February, 1883, and which was accepted in terms by the appellants on the 7th of March, 1883, wrote: "We hereby offer to supply the whole of the steel required by you for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained, at the following prices."

The 12,000 tons here mentioned had already been contracted for.

The general conditions attached contained these clauses: "The work and material herein described or referred to is to be executed and supplied in strict accordance with the specification attached to your contract for the construction of the Forth Bridge." Accounts were to be settled monthly: and the appellants were to have power to cancel this contract with a three months' notice if their contract for the erection of the bridge was cancelled.

The steel to be manufactured, and "deliveries are to be made at such times and in such quantities as you may from time to time require, . . . it being understood that you will furnish specifications, so that the deliveries shall be as near as possible made in equal monthly quantities over the period named" (four years).

Then followed these clauses:—

"The estimated quantity of steel we understand to be 30,000 tons, more or less."

"Any question that may arise as to the meaning or intent of this contract to be settled in the case of difference by the engineer of the Forth Bridge Railway Company for the time being, whose decision shall be binding upon both parties."

Clause 54 of the specification annexed to the contract for the construction of the bridge was as follows:—

"SUPERSTRUCTURE.—The contract sum must be based upon the assumption that the superstructure will include 42,000 tons of steel work in main spans, and 20 tons of cast steel in bed plates and sundries; 3000 tons of wrought iron in approach viaduct," &c.; "any alterations or omissions in, or additions to, the above quantities will be estimated at schedule rates, and be added to or deducted from the contract sum, as the case may be."

After the date of the respondents' contract it was decided by the constructors of the Forth Bridge to substitute steel for iron in the approach viaducts and shoes of the caissons.

The Court of Session held that the words "Forth Bridge" in the contract, "We offer to supply the whole of the steel required for the Forth Bridge," meant the superstructure, or four main spans, on the ground that the same quantity of steel was attributed to that portion of the bridge. This decision was not questioned in this appeal.

The questions in this appeal were, First, whether the arbitration clause was binding on the respondents. They maintained it was not, because there was not such a delectus personæ as the law of Scotland requires in a contract of this description.

The second question was, whether the respondents were entitled under the contract to supply all the steel actually used in the superstructure, less the 12,000 tons previously arranged for, or whether the appellants' contention was correct, that "30,000 tons, more or less," meant, with a margin for waste, five per cent. more or less of 30,000 tons. In support of this contention the appellants sought to prove an alleged custom in the Glasgow trade.

They averred (cond. 4) that by the custom and practice of the iron and steel trade of Glasgow a contract for the supply of a quantity of manufactured iron or steel, in which the quantity to be supplied is described as the whole iron or steel which is or may be required for a particular purpose, and which also contains a clause expressing the estimated quantity to be delivered and taken, is held to be a contract only for the estimated quantity so expressed. And the words "more or less" are by the said custom understood to mean that the quantity delivered should not exceed or fall short of the estimated quantity by more than five per cent.

The Lord Ordinary was for allowing a proof of the custom; but the First Division, by interlocutor dated the 22nd of December, 1887 (1), recalled that portion of the Lord Ordinary's judgment, and affirmed his decision that the clause as to arbitration was ineffectual, and remitted to the Lord Ordinary to proceed.

The third question was whether the respondents' acts had

(1) 15 Court Sess. Cas. 4th Series, 215.

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estopped them from now contesting the appellants' construction of the contract.

The evidence as to the acquiescence of the respondents was substantially, that when the appellants found they could get the steel rivets, which were to be manufactured out of steel supplied by the respondents, cheaper, they obtained about 1450 tons from the Clyde Rivet Company, who obtained the steel from the respondents. The respondents complained; and the appellants' account of the matter was that the respondents acquiesced on being informed by the appellants that 30,000 tons would be taken under the contract; and that therefore the contract would be satisfied. On the other hand, the respondents swore that at the meeting the appellants' manager spoke to the quantity of steel likely to be required as being much larger than what had been expected, and on that ground they did not say any more. The appellants also alleged that the respondents knew and acquiesced in the appellants obtaining steel inter alia for the shoes of the caissons and for the approach viaducts. They also relied on two minutes of the respondent company, dated the 23rd of September, 1885, and 7th of October, 1885, respectively, to shew the respondents' then reading of the contract.

In the first the respondents noted that, at the request of the appellants, they would accept bills on certain terms in payment of their account, "provided they agree to give us the order for any steel they may require over our contract quantity, and at our contract price, for the Forth Bridge."

The second minute bore that the respondents' manager had seen the appellants' representative in respect of the bills, and, "In consideration of this concession, these gentlemen agreed that our contract with their firm should be taken as covering the whole of the steel required for the completion of the Forth Bridge, except that covered by the contract with the Landore Siemens Steel Company, which is for 12,000 tons plates."

That the appellants' representatives "pledged themselves to carry out this arrangement, but stated that they did not think it judicious to embody it in a formal letter."

On the 2nd of March, 1888, the Lord Ordinary pronounced an interlocutor, in which he held, that "The pursuers are entitled

to supply, and that the defenders are bound to take from the pursuers, the whole of the steel required in the construction of the Forth Bridge, in so far as such steel is or may be required in the construction of the four main spans of said bridge."

On a reclaiming note the First Division (February 1, 1889) varied the Lord Ordinary's interlocutor by inserting after the words "construction of," the words "the superstructure of," as the Lord Ordinary's judgment would have covered the steel shoes of the caissons, a contention which was departed from in the Inner House, and quoad ultra adhered.

The appellants appealed against six interlocutors, the chief being those of the First Division delivered on the 22nd of December, 1887, and the 1st of February, 1889 (1).

March 6. Sir *R. Webster*, A.-G., and Sir *Horace Davey*, Q.C. (with them the Dean of Faculty, *J. B. Balfour*, Q.C.), for the appellants:—

The arbitration clause is binding on the respondents; and the construction of the contract is to be decided by Sir John Fowler, the engineer of the Forth Bridge. There is no doubt it has been laid down in Scotland that an obligation to refer future disputes to arbitration is not binding on both parties unless there is a delectus personæ: *Buchanan* v. *Muirhead* (2). But there is here a sufficient delectus personæ. The parties both agreed, and the contract was on the footing, that Sir John Fowler was the engineer of the Forth Bridge, and he is so still, and he was therefore properly identified. The Scotch doctrine has not met with universal approval: see *Parish of Rathven* v. *Parish of Elgin* (3).

[LORD HALSBURY, L.C.:—That case does not apply. There the parties went before the arbiters, and, having obtained a judgment, one of them attempted to draw back.]

In *Merry and Cunninghame* v. *Brown* (4), an arbitration clause,

(1) 16 Court Sess. Cas. 4th Series, 440.

(2) Mor. Dict. 14593.

(3) Law Rep. 2 H. L. (Sc.) 535, reported under the name of *Bremner* v. *Elder*, in 2 Court Sess. Cas. 4th Series (H.L.) at p. 138.

(4) 21 Court Sess. Cas. 2nd Series, 1337; reported on another point, 1 Court Sess. Cas. 3rd Series (H.L.) 14.

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which did not name the arbiter, was held good. If Sir John Fowler had been named as the engineer of the Forth Bridge in this clause there could not have been a doubt that the clause was binding. And the doctrine of the Scotch law that the arbiter must be named ought not to be extended to this case, where both parties knew Sir John Fowler was the holder of the office designated. [On this point they also cited *Hendry's Trustees* v. *Renton & Co.* (1).]

As to the legal construction of the contract. The words the "whole of the steel required" are expressly made subject to the general terms and conditions, and therefore meant 42,000 tons less 12,000—that is, 30,000 tons of erected steel. Clause 54 of the specification contained words of limitation and gave the amount of steel. That was the total the parties were contracting for. The stipulation as to monthly deliveries confirms this view. The contractors, not wishing to make the contract too burdensome on the steel-merchant, agreed to the limit of 30,000 tons to expressly limit the amount of steel they could demand.

The contract deals with erected steel, and the words "more or less" meant five per cent. either way. The evidence of custom was that in such a contract as this it is the practice to limit the estimated quantity to that quantity because both parties must make sub-contracts, and although a custom of trade may not be allowed to add to or detract from a contract, yet here the alleged custom is the same as the construction the appellants contend for.

As to the acts of the respondents. They were an extraneous interpretation of a hitherto ambiguous contract, and shewed that the respondents put the same construction upon the contract—shortly after its date—as the appellants. These acts bar the respondents from now reading the contract differently.

Romer, Q.C., and *Finlay*, Q.C. (with them, Sir *Charles Pearson*), appeared for the respondents, but were not called upon.

Dec. 7. LORD HALSBURY, L.C.:—

My Lords, when once the questions sought to be raised by this appeal were sufficiently clearly before your Lordships, I do

(1) 13 Court Sess. Cas. 2nd Series, 1001; 23 Scotch Jurist, 400.

not believe that any of your Lordships entertained any doubt that these judgments must be affirmed.

The first question raised was as to the competency of the Courts to entertain this action at all, upon the ground that the parties had themselves selected their tribunal. That depended upon a question of Scottish law. My Lords, nothing is gained in the elucidation of that question by considering the differences that may exist between the Scottish and the English laws upon the subject of arbitration. This was a Scotch contract, and this litigation must be determined by the law of Scotland; and certainly for ninety-one years (1) it has been recognised as part of the law of Scotland—constantly acted upon, and recognised and affirmed in this House—that in order to have the effect which the appellants insist upon in this case the parties to an agreement for an arbitration must have selected an individual person. The question which first arises here is whether within that rule the parties have agreed upon a particular person. I do not understand the rule in Scotland to make any point as to the mode in which that person should be described. If an existing dispute was referred to a person not described by his Christian name and surname, but described by the name of his office, I do not understand that there is any decision of the Courts in Scotland which would not make that an effectual agreement so as to bar the Courts from exercising jurisdiction when pleaded by one of the parties, as against the right of the other to appeal to those Courts. Feeling of course the pressure of the observation that arises upon that, the Attorney-General sought to establish here that the engineer for the time being was Sir John Fowler, and that inasmuch as the dispute had arisen during the time that Sir John Fowler was the engineer, therefore each of the elements which he impliedly admitted were necessary in order to constitute an effectual bar in the Scottish Courts was established by those circumstances. But the fallacy of that argument rests upon this assumption, that you can judge by the fact of how it operates afterwards instead of seeing what was the meaning of the agreement at the time when the parties entered into it. One

(1) June 25, 1799: *Buchanan* v. *Muirhead*, Mor. Dict. 14593.

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must look at the language of the contract between the parties (because it *is* the contract between the parties) and see whether at that time and by virtue of the contractual language they have used they have sufficiently chosen the person who shall be their arbitrator. The moment one applies that test and finds that the contract is referring to any dispute which may arise in future, and that it is agreed that the engineer for the time being of the Forth Bridge shall be the person who shall decide it when that dispute shall afterwards arise, it is too plain for argument that those two conditions render uncertain the person who shall ultimately decide it. The engineer might not have been the engineer the next day—the dispute might not have arisen until long afterwards—and you therefore have a double uncertainty which excludes in this case one of the essentials of a Scotch contract which will bar the ordinary Courts of law of their jurisdiction, namely, certainty in the choice of the person whom the parties by their contract have agreed shall be their arbiter and judge.

My Lords, I am scarcely able to follow the observation (which appeared to be the only observation made in reply to this objection) as to the possibility that the person so chosen and agreed upon between the parties might die. How is that relevant to the question? The person is chosen. The certainty between the parties who shall be the person to arbitrate is abundantly clear by their hypothetical agreement. That he may die and may not ultimately decide the question is not the uncertainty which is condemned by the Scottish Courts. The certainty which is insisted upon by the Scottish jurisprudence is that the parties have agreed upon the person; but that he shall actually judge is not the certainty insisted upon, because, as it is said, he may die or the parties may agree between themselves, and no dispute may arise. Therefore it seems to me that the only answer which has been attempted is nihil ad rem—it does not affect what appears to me to be abundantly clear upon the authorities, namely, that here there is an uncertainty as to who is the person to decide, and that is fatal to the contention that a particular person has been by the contract chosen between the parties.

My Lords, the question therefore being open to the Courts, and this being an action upon the non-fulfilment of the contract between the parties, the next question in order of date is, what is the contract between the parties? Now, upon that subject I confess I am a little astonished that it should have occupied your Lordships so long; and, I apprehend, it would not have done so but for the magnitude of the sum, and, I suppose, the enormous nature of the magnificent work with which it is connected. What was really the contract between the parties? Now the contract between the parties is by offer and acceptance in identical terms, making, of course, the proper differences between the possessive pronouns. The contract is for the supply on the one hand, and the acceptance on the other, of the whole of the steel required for the Forth Bridge; and the first suggestion which appears to be made is that you can qualify and cut down the word "whole" by looking to the Forth Bridge, and seeing that this is a composite structure not entirely composed of steel, and that if you shew that there is some part of the Forth Bridge that is not to be supplied by the suppliers of the steel, that lets in every kind of loose evidence as to what the word "whole" signifies. I hope I have not done injustice to the argument, which it is possible I may have done, since (to speak quite candidly) I was not able entirely to comprehend it, and I am not quite certain that I entirely comprehend it now. The words are as plain as the English language can make them—they are to "supply the whole of the steel." Well, that, standing by itself (I speak not for the moment as to the attempted evidence by which that word is to be translated—I will deal with that hereafter), looking at the language of the contract itself, it seems to me to be about as plain as anything can be.

The next suggestion has reference to the words, "The estimated quantity of steel we understand to be 30,000 tons, more or less." Now let us see, in the first instance, whether those words in their natural and ordinary meaning control, cut down, or in any way affect the language of the first part of the contract: "We hereby offer to supply the whole of the steel required by you for the Forth Bridge, less 12,000 tons." Suppose we had found there, "The estimated quantity of steel we understand to

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be 30,000, more or less." No answer appears to me to have been given to a question which was more than once propounded to the learned counsel: if that meant 30,000 tons, neither more nor less (apart from the question of "more or less" and the interpretation that might be given to those words), why did not the parties say so? Instead of saying, "We hereby offer to supply the whole of the steel required by you for the Forth Bridge," why did they not say, "We offer to supply 30,000 tons, more or less, for the Forth Bridge"? From first to last I heard no answer given to that interrogatory. Then it stands that there is a word here used which is apt and fitting, and no other word that I can suggest is more apt or more fitting to convey that meaning of the contract that the respondents were to be the suppliers of the whole of the steel required for the Forth Bridge.

Then it is said that the Forth Bridge comprehends a good deal more than this. Now, as to that I find that the first of the "general conditions" is that "the work and material herein described or referred to is to be executed and supplied in strict accordance with the specification attached to our contract for the construction of the Forth Bridge, and to the entire satisfaction 'in all respects' of the engineer." Now, when I turn to the specification, without going through the different items of the steel (which themselves are not without importance with reference to what part of the Forth Bridge was to be made of steel to be supplied under the terms of this contract), I find that there is a provision which corresponds exactly in point of amount with the estimated quantity of the steel, and although I find that afterwards (it is immaterial to consider, in construing the contract, what happened afterwards) alterations were made in the design whereby some things were turned into steel which were originally intended to be of iron, still we are construing the language of this contract by the specification that was before the parties, and which is recited as being before the parties at the time when they made their contract. The Court of Session appear to have drawn a very just and natural conclusion from what you find here. When you find these words, "The estimated quantity of steel we understand to be 30,000 tons," and then add the 12,000, you get the 42,000 tons referred to in that provisional specification; and

then the Court of Session, I think not unnaturally, say: "We look at the contract and the specification which was before these parties, and we find that although they have used the phrase 'required for the Forth Bridge,' there is a quantity specified as being applicable to this," and I see that accordingly the interlocutor which was ultimately pronounced is that the present respondents are entitled to supply the steel "in so far as such steel is or may be required in the construction of the superstructure of the four main spans," that being what, by a reference to these two instruments, it is perfectly manifest the parties were contracting about at the time when they entered into this contract.

My Lords, the only other observation which I wish to make upon this part of the case is that the language, as it appears to me, speaks for itself. It is not language of contract—the parties do not contract anything—it is a statement of what they understand to be the fact. If there had been anything in the nature of contract in this language, these are not apt words to use, "The estimated quantity of steel we understand to be 30,000 tons." It strikes me that both the parties knew perfectly well what they were doing, and they used very fitting and proper language in order to express their meaning.

Now, Sir Horace Davey yesterday insisted upon an argument which I am bound to say I was somewhat surprised to hear from him, namely, that these words would have no operation. No contractual operation, I agree, but they have a very important operation with reference to some parts of the contract. So little are they parts of the contract itself that the fact there recited as being the state of the knowledge of the parties at the time might, I think, have been proved if there had been no such statement connected with the contract at all. But then the question might afterwards have arisen, whether the deliveries were reasonably and properly made within the meaning of the contract. If the engineer of the Forth Bridge was complaining that there had not been sufficiently large deliveries monthly to make the proper proportion of deliveries during the four years over which this contract was to be spread, could it be doubted, that if that was insisted upon by the engineer of the Forth Bridge, the contractor

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might prove, even if these words were not here, but had been only stated to him by parol, "There is no definite quantity that I am bound to deliver every month, but you yourself led me to believe that such and such was the quantity, and accordingly I made provision for that, and if you insist upon my making deliveries at a greater rate, so that they shall be proportionate to the greater amount which you mean to take, it is not my fault—it is yours. You ought not to have misled me as to the amount which you estimated you would require." My Lords, I should have thought it would have been impossible to doubt that that was relevant evidence with reference to late delivery, whether that statement was there or not; but its being there renders it certain that that was the state of knowledge and estimate of the parties, and it was convenient for future reference in case any such question should arise.

My Lords, I confess, speaking for myself, that I think that the words "more or less" are the ordinary words which occur in a contract of this sort; and whether they had been there or not, I so far agree with Sir Horace Davey that it was intended to be a mere estimate. I regard the words "more or less" as the ordinary words which one meets with in a contract, where they are equivalent to "about so much," and where the contract is not to be rendered void in respect of either of the parties because either a little more or a little less than the amount contracted for has been supplied. I am rather disposed to agree with Sir Horace Davey that the word "estimated" would probably have had the very same operation if the words "more or less" had not been there.

My Lords, I come, therefore, without the smallest hesitation or doubt, to the conclusion that these words, "the whole of the steel required for the Forth Bridge," are obligatory upon the parties and form a part of the contract, and that the contractor is entitled to insist upon his right to supply the whole of the steel, whatever it may be.

Now, the next point insisted upon is, that we can cut down and override this contract, and the language in which it is conceived, by some sort of custom. My Lords, I certainly have heard a good many experiments of this sort tried, but I think I never heard a bolder one than this. It was only necessary to read the

plea and shew the suggested evidence, and what it was supposed to establish, to see how absolutely absurd and unworthy of consideration was the attempt to control the contract by such evidence. My Lords, upon that subject, perhaps, I do not take quite the same view as is taken by some of my noble and learned friends. I do not mean to say that there has not been some looseness in the application of the rule in some of the English cases. I think there undoubtedly has, and some evidence has been admitted which upon a stricter view of the authorities would, I think, now be rejected; but I think the principle is the same in both countries—you may translate the words of a contract; you cannot vary or alter it. I remember one very remarkable case, *Cuthbert* v. *Cumming* (1), which was argued by one of my noble and learned friends (2) as to taking away sugar and molasses from Trinidad. There the words, "a full and complete cargo," were interpreted with reference to the port of loading, and it was argued that it was customary to send in a ship from that port, not a cargo corresponding to the whole carrying capacity of the ship, which the words primarily mean, but a cargo of sugar and molasses, which by the custom of the port of loading was loaded in some constructions or other which took up a good deal of room in the vessel. That case seems to me to furnish a good illustration of translating the obligation by the custom of the port in respect of what was undertaken by those words on the part of the person entering into such a contract. But here it is only necessary to say that no possible construction which could be put upon any of the cases would let in such evidence as was sought to be let in in this case. The argument came to something like this, that persons dealing in this way did not perform the actual contract, but made another contract for themselves. It is something like one of the cases which your Lordships had before you not very long ago with reference to the custom of Liverpool (3), where it was proved that the custom was that people broke their contracts and then paid damages when they had broken them. That is not a custom which can control or break down any express contractual language of the parties.

(1) 11 Ex. 405. (2) Lord Bramwell.
(3) *The Royal Exchange Shipping Co.* v. *Dixon*, 12 App. Cas. 11.

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My Lords, it only remains to consider, and I will consider it very shortly, a question which here upon the facts all the judges have agreed does not arise (and I must say that I entirely concur with them), namely, whether there was an acting by either of the parties in such a way as to alter the position of the other party insisting upon one construction of the contract—so altering the position of the parties that one of them may say, "You cannot insist upon the true construction inasmuch as you have altered the position of us the other party."

My Lords, I must say that I entirely agree with the learned judges that no such question arises as a matter of fact. In truth it is only capable of plausible statement as applicable to the rivets, and really the question as to the rivets comes to this. There was in my view a departure from the contract; but when the parties to that question came to discuss it, instead of insisting upon it, or instead of arguing it out, or altering the position of the other party by insisting upon the construction of the contract, what they did, as a matter of fact, was this—the appellants said, "Well, we are good customers; we shall want more steel than you thought in the first instance, and therefore you had better say nothing about it." That is practically all that occurred with reference to the rivets. Now, can it be said, having regard to that state of facts, that the question which is insisted upon here arises at all? I think I should be paying an undue compliment to that part of the case, a compliment which I am bound to say, in justice to Sir Horace Davey, he did not himself pay to it, by arguing it further. That question, as a matter of fact, does not arise.

Therefore it seems to me that on all the grounds insisted upon there is no pretence for saying that the Court of Session did not arrive at the right conclusion, and I therefore move your Lordships that the judgment of the Court below be affirmed, and that this appeal be dismissed with costs.

LORD WATSON:—

My Lords, I also am of opinion that no cause has been shewn for disturbing the judgment of the Court of Session. Indeed, it would be hard to say which of the numerous contentions addressed

to us on behalf of the appellants was the most destitute of either substance or plausibility.

In regard to the matter of arbitration, I may observe that the expression delectus personæ, which occurs in *Buchanan* v. *Muirhead* (1) and subsequent cases, does not appear to me to have been happily chosen. If it had been open to us to consider what was styled in argument "the principle" of delectus personæ, I should have been disposed to hold that the selection of an unknown person, whose official or professional position afforded a guarantee of his fitness to discharge the functions of arbiter, was as much within the principle as the choice of a known arbiter designated by name. But that is not the question with which your Lordships have to deal. It has been settled by a uniform course of judicial decisions, extending over nearly a century, that according to the law of Scotland an agreement to refer future disputes, if and when they shall arise, to the person who shall then be the holder of a certain office, is not binding. In the year 1883, parties were entitled to contract, and, in my opinion, must be held to have contracted, on the footing of the rule thus settled. The reference which the parties have made in this case, of "any question that may arise as to the meaning and intent of this contract," to the determination of "the engineer of the Forth Bridge Railway Company for the time being," is clearly within the rule; and the respondents had therefore the right to submit their differences, which arose in 1886 or 1887, to the decision of any competent Court.

The respondents' offer, which was accepted in terms by the appellants, is "to supply the whole of the steel required by you for the Forth Bridge, less 12,000 tons of plates." One of the general conditions of the offer is, "The estimated quantity of steel we understand to be 30,000 tons, more or less." It has been found by the Court below, and is not now disputed, that the term "Forth Bridge," as used in the contract, signifies the superstructure of the four main spans; but that finding cannot in any way affect the question raised by the argument of the appellants, who contend that, according to its true construction, the contract is one either for 30,000 tons of steel, or for a quantity about 30,000 tons.

(1) Mor. Dict. 14593.

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Lord Watson.

I find it difficult to deal seriously with such an argument, because it appears to me that for, the purpose of imposing an express obligation upon the respondents to supply, and upon the appellants to receive and pay for all the steel required for the superstructure of these four spans, more appropriate words could not be found than those which occur in the contract. Except by denying all effect to the plain language of the obligatory clause, it is simply impossible to treat the estimate of quantity as being other than a statement of what would probably be required if the engineers of the Forth Bridge did not alter their specification of materials during the progress of the works.

After what has been already said by the Lord Chancellor, I think it unnecessary for me to refer either to the appellants' proposal to lead evidence of custom in contradiction of the express terms of the contract, or to the suggestion that the claims of the respondents have been barred by their actings.

LORD BRAMWELL:—

My Lords, I concur, and I agree entirely with my noble and learned friend opposite who has just expressed his opinion. I must say that I think it is a very strange thing that this case ever appeared in your Lordships' House. As a matter of reasoning, I confess that I do not understand the decision, or rather I ought to say the law, because the decision follows the law, upon what I may call the question of delectus personæ, inasmuch as it seems to me that Sir John Fowler was identified, and consequently was properly appointed, within the rule for arbitrating upon such disputes as might arise during his holding of the office of engineer of the company. But then he might cease to be engineer. Very well—then he would not be the person appointed as arbitrator for disputes after he had ceased to be engineer. But why was he not sufficiently appointed for such as did arise while he was engineer? I confess that as a matter of reasoning I cannot understand it. It is true he might cease to be engineer, and then he would not be the person appointed for arbitrating in all disputes. But in the same way he might die. However, my noble and learned friend opposite (Lord Watson) says, and the judges in the Court below have said,

what the law is, and therefore one may take it upon the sort of argument which was used when none other could be found, and say, according to the Norman-French maxim, C'est un ancien positive ley del Corone, independently of all reasoning upon the matter. I therefore concur with the opinions which have been expressed upon that subject.

Then as to the question whether the contract is in any way qualified or affected by the statement that the estimated quantity which would be required was 30,000 tons, it really does seem to me perfectly idle; because suppose the contract had run thus: "The estimated quantity of steel which will be required is 30,000 tons, but we will supply all that you require;" can any human being say that there would have been in that case a doubt about it? And is there any difference because the words, instead of being in the collocation which I have mentioned are in a different one? I think the case is too plain.

As to the other questions, I do not think it necessary to say anything in addition to what has been said already.

LORD HERSCHELL:—

My Lords, I am entirely of the same opinion, and I only think it necessary to say a word upon the first point. I understand it to be settled Scotch law that a provision in a contract that future disputes shall be referred to a person designated only by his filling a particular office or position does not oust the jurisdiction of the Court, or rather, it would be more accurate to say, does not bar the right of either party to resort to the Court in case disputes should arise upon the contract. I think that that doctrine having been laid down so long ago, whether it rests upon any sound basis or not, it would be most improper to depart from it now, because one would be really altering the contract between the parties; for we have a right to suppose that they have entered into it upon the basis of that which for nearly a century has been understood to be the law.

LORD MORRIS:—

My Lords, it appears to be settled by a series of decisions in Scotland, commencing with the case of *Buchanan* v. *Muirhead* (1),

(1) Mor. Dict. 14593.

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Lord Morris.

that a reference of possible or contingent questions contained beforehand in a contract to a person unnamed or to an individual or individuals filling an official position, does not oust the jurisdiction of the Courts of law, and is no bar to the pursuer resorting thereto in the first instance. This state of the law of Scotland seems so settled that, in my opinion, parties contracting must be assumed to have contracted with reference to it, and that if we were now to hold such a condition of arbitration as the present to be obligatory on the parties to pursue it alone, and not resort to the Courts of law, that would be introducing a condition into the contract which the parties themselves did not introduce.

In my opinion, it is not now competent for us to consider whether the principle upon which this series of authorities is based was sound or not, and whether there is any real distinction between the choice of an arbitrator expressly named and the choice of an arbitrator described by the office he held at the time of the contract, or would subsequently hold.

On the second and main question the pursuers rely on the plain words of the contract, which are, "We hereby offer to supply the whole of the steel required by you for the Forth Bridge, less 12,000 tons, subject to the terms and conditions," &c. Primâ facie that clearly states that the pursuers agreed to sell, and the defenders agreed to buy, all steel required for the Forth Bridge, less 12,000 tons, which had been previously contracted for. If the contract stood so, it would embrace every bit of steel used in the construction of the Forth Bridge; but the first condition subject to which the statement of contract is made is that the material is to be supplied in strict accordance with the specification attached to the contract, and clause 54 of the specification says the contract sum agreed upon was based upon the assumption that the superstructure will include 42,000 tons of steelwork in the main spans—that is, 30,000 plus the 12,000 contracted for previously to the contract now in contention being entered into.

[His Lordship, after saying he agreed with the decision of the Court of Session that the legal obligation between the parties was that the pursuers should supply and the defenders should receive the whole quantity of steel required for the superstruc-

ture of the four main spans, because that is the only requirement of steel for the construction of the Forth Bridge by the principal contract itself, continued:—] The defenders, however, are not satisfied by this limitation, for they contend that the words, "The estimated quantity of steel we understand to be 30,000 tons, more or less," control the previous part of the contract, which in terms says the "whole of the steel required." In fact, the defenders say that the contract is one expressly for 30,000 tons, subject to some slight accretion or diminution under the words "more or less." I cannot yield to such a contention. I have heard no answer given to the question why, if such was the contract, as alleged by the defenders, it was not a contract simply for 30,000 tons of steel.

Again, suppose the quantity of steel required for the superstructure of the four main spans, instead of exceeding the estimate of 42,000 tons by 9000 tons, had been 9000 tons less than the estimate, the defenders are driven to argue that they would have been bound to take delivery of 9000 tons of steel for works which had been completed. Again, this clause is not contained in the principal part of the contract; it is in collocation only connected with the clause as to times of delivery. It is, in my opinion, merely an understanding that 30,000 tons would be the probable amount that would be required for the purposes of the contract, plus the 12,000 tons, an understanding arrived at, not by any contemplated bargain for such an amount absolutely, but by reason of that being the amount that was stated in clause 54 of the specification.

On the third question, my Lords, when the circumstances are looked into, it appears that there has been no acting of the pursuers contrary to the construction given to the contract by the Court of Session, except in respect of a certain number of tons of steel rivets, which were got by the defenders from the makers, and not from the pursuers. But on this point there is conflicting evidence as to whether it was, as contended by the defenders, an order acquiesced in by the pursuers as being outside the contract; or, as the pursuers allege, a matter they objected to at the time as in breach of the contract, though they did not wish to fall out about so small a matter. In either aspect,

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it appears to me that it cannot be held to vary the rights of the parties under the contract. I therefore agree in thinking that the judgment of the Court of Session should be affirmed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

[c] *Lords' Journals*, 7th March, 1890.

Agents for the appellants: *Martin & Leslie, for Millar, Robson & Innes, S.S.C., Edinburgh.*

Agents for the respondents: *Durnford & Co., for Tods, Murray & Jamieson, W.S., Edinburyh, and McGrigor, Donald & Co., Writers, Glasgow.*

[HOUSE OF LORDS.]

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SUTTON & CO. . . . . APPELLANTS;

AND

CICERI & CO. . . . . RESPONDENTS.

Carrier—Forwarding Agents—Contract—Injury to Goods—"Terra-Cotta Busts"—"Statuary"—Burden of Proof—Practice—Evidence.

The pursuers wrote to the defenders informing them that they had a quantity of goods for shipment both at Venice and Leghorn, consisting of wooden figures, old cases, marble and terra-cotta busts, marble columns, wood frames, &c., and asking for the defenders' rate for such goods from the above ports to Glasgow by steamer. The defenders replied, "We have the pleasure to quote you for alabaster goods, furniture, &c., but not for goods described as statuary, the rate of 1s. per cubic foot." The pursuers replied, "You seem to make a difference between marble busts and columns and alabaster. Please let us know about this." The defenders, in their reply, informed the pursuers that the rates quoted did not cover insurance risks, but were simply for freight, and gave no answer to the question about the difference between marble busts, columns, and alabaster. Goods were thereupon handed to the defenders at Leghorn, described by the agent who delivered them as eight cases of "terra-cotta bronzed." In an action for damage to such goods during their transit, there was contradictory evidence from witnesses as to whether the goods in question were "statuary":—

Held, affirming the decision of the Court of Session (16 Court Sess. Cas. 4th Series, 814), first, that the exception of insurance risks did not discharge

the defenders from their liability as ordinary carriers; secondly, that the defenders had failed to prove that "terra-cotta busts" came within the exception "goods described as statuary."

Per LORD WATSON:—General evidence as to the meaning of words of contract ought not to be admitted without a distinct averment on record as to the particular words to which the proof is to be directed, and the precise technical or trade meaning which is intended to be attributed to them.

APPEAL from a decision of the Second Division of the Court of Session, Scotland (1), reversing the judgment of the Lord Ordinary, Lord Trayner.

This action was brought in respect of the damage sustained by some goods belonging to the respondents, Ciceri & Co., dealers in ceramic ware and sculpture in Edinburgh, the carriage of which was contracted for with the appellants, Sutton & Co., from Italy to Scotland.

The sole question turned upon the construction to be put upon the special contract and the liabilities which it imposed.

On the 26th of October, 1887, Ciceri & Co., who were the plaintiffs in the action, wrote to Sutton & Co., who arranged for and undertook the carriage of goods from abroad to this country, a letter in which they said:—

"We have a large quantity of goods for shipment both at Venice and Leghorn, consisting of wooden figures, old cases, marble and terra-cotta busts, marble columns, wood frames, &c. Will you kindly let us know your rate for such goods from both the above ports to Glasgow by steamer."

On the 12th of November Messrs. Sutton wrote: "We have the pleasure to quote you for alabaster goods, furniture, &c., but not for goods described as statuary, the rate of 1*s.* per cubic foot." "These rates are for freight only."

On the 18th of November Messrs. Ciceri wrote: "You quote 1*s.* per cubic foot, but if steamer's option should be by weight, what then? You seem to make a difference between marble busts and columns and alabaster, while our other quotation" (meaning a quotation from another carrier) "is for both cubic and ton weight, 1000 kils., for marble busts and columns. Please let us know about this, and also what your usual primage is."

(1) 16 Court Sess. Cas. 4th Series, 814.

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To that letter the answer is sent on the 21st of November :—

"If the goods would yield the steamship company more per 20 cwt. than per 40 cubic feet, then the charge will be 30s. per ton weight instead of per ton measurement." "We may tell you that the rates which we have quoted you are very low, and it will be hardly necessary for us to tell you that they (being quoted on the same basis as the rates of the steamship companies) do not cover any insurance risks, but are simply for freight." No answer was given to the question, "You seem to make a difference between marble busts and columns and alabaster."

In consequence of the contract initialed by these letters, Messrs. Ciceri & Co., on the 25th of November, sent on orders to uplift the goods. These orders related only to goods consisting of terra-cotta busts and bas-reliefs and cases of alabaster, and these were handed over to the agents of Messrs. Sutton & Co. in Italy, and shipped and delivered by them, described by the shippers as "terra-cotta bronzed" (1). The order for marble busts was not given to Messrs. Sutton & Co. When the packages arrived in Scotland it was found that the terra-cotta busts and bas-reliefs had sustained very considerable damage, and, in fact, were so broken as in many instances to be worthless.

This action was then brought by Messrs. Ciceri & Co. against Messrs. Sutton & Co. for damages. The main defence set up by the appellants was that these goods came within the terms of the letter of the 12th of November, 1887, "being goods described as statuary," and therefore were goods for which they had not quoted a price, which they had not agreed to carry, and which ought not to have been sent for carriage by them under the contract which had been made, without a special notification, which would have enabled them to insist upon other terms. Their second defence was that the rate quoted did not cover any insurance risks, and they were consequently under none of the liabilities of common carriers. Messrs. Sutton & Co.'s usual consignment bill, and which had been signed by Messrs. Ciceri & Co. in a previous dealing but not in this, contained this clause :—

(1) This word "bronzed" simply meant they were of a colour to represent bronze.

"Neither will S. & Co. be held responsible for any loss or damage at sea or by land carriage, except insurance is effected with them, and then only for the amount insured."

Certain parol evidence was adduced in the Court of Session as to the meaning of the word "statuary." Its effect and character will be found sufficiently set out in Lord Watson's opinion.

On the 6th of November, 1887, the Lord Ordinary (Lord Trayner) pronounced an interlocutor in favour of the Messrs. Sutton & Co., being of opinion that although it had been proved that the goods were sufficiently packed for safe transit, and that the Messrs. Sutton (dealing with them not as common carriers, but as special carriers) were responsible for the fault of their agents who carried the goods, yet they were not liable because the damaged goods were "statuary."

The Second Division, consisting of three judges, by interlocutor, dated the 20th of March, 1889, reversed (Lord Lees dissenting) the Lord Ordinary's judgment, and found the Messrs. Sutton & Co. liable to the Messrs. Ciceri & Co. in the sum of £38, the cost price of the goods, the Messrs. Ciceri & Co. to have also the broken goods, valued at from £2 to £6, and the freight of the damaged goods deducted from the Messrs. Sutton & Co.'s account (1).

On appeal.

March 14, 25. *Bosanquet*, Q.C., and *Vary Campbell* (of the Scotch Bar) (with them, *J. R. M'Ilraith*), for the appellants:—

The evidence of those who know the carrying trade shews these goods are terra-cotta statuary. And in every sense these goods are statuary in the ordinary meaning of the word, there being in the letters nothing to alter that meaning. Therefore there was no contract to carry them, for the defenders excluded "statuary." Under the Railway Clearing House's list for January, 1888, these goods would not have been carried at all except by special contract or at owner's risk: see page 66—"Statuary" (including terra-cotta statuary) "as per agreement only"; page 70—"Terra-Cotta," "statuary," "as per agreement only," "at owner's risk."

(1) 16 Court Sess. Cas. 4th Series, 814.

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Rigby, Q.C., and *William Mackenzie*, appeared for the respondents, but were not called upon.

March 25. LORD HERSCHELL:—

[His Lordship having stated the facts as above, and that it was to be regretted their Lordships' time had been occupied upon a question involving so trifling a pecuniary amount raising no question of principle, continued:—]

My Lords, apart from the question of liability, with which I will deal presently, whether it be as common carriers or for negligence only, and dealing for the moment with the exception contained in the letter of the 12th of November, the burden clearly rests upon the appellants of shewing on this part of the case that these goods which were damaged fall within the language of their letter as "goods described as statuary."

Upon the question whether they would be, or ought to be, or could be so described, there was a considerable amount of evidence given—evidence of three kinds: of dealers in such works, artistic evidence, and the evidence of those connected with the carriage of goods. I cannot think that any of that evidence is material except the evidence of the sense in which that word would be understood by those engaged in the carriage of goods. Indeed, it may be said, strictly speaking, that the proposition would need to be limited still further, and that it would only be the evidence of those engaged in the carriage of goods from abroad to this country that would be material.

It seems to me that we have nothing to do with the artistic definition of "statuary." If we had, I think we should have very considerable difficulty in arriving at any exhaustive definition, from the materials afforded from the evidence before us, of what is comprised within the term "statuary," because the artists seem to use the word in different senses—that is to say, some as more extensive and some as less extensive.

It is quite clear that there are certain things which all mankind agree come within the description of "statuary." A marble bust chiselled by an artist, or a marble full-length figure, I do not suppose anybody could possibly doubt is within the term "statuary." The difficulty arises as to whether certain other

things fall within it or not; and if the appellants have left it doubtful whether these particular goods come within that which is described or can properly be described as "statuary," they have failed to bring the case within the exception upon which they rely.

Now, certainly there is no common agreement amongst the artists which would shew that these terra-cotta busts are articles described as "statuary"; nor can it be said that there is any such common agreement among the dealers in such goods. When I come to those who speak of the word in relation to the contract of carriage, I think that the same statement must be made. The first witness who was called for the appellants, who is a dealer in artistic goods and works, said that in a general sense he would consider these goods as statuary, but not in a literal sense —that is to say, that the word "statuary" is sometimes used in the one sense and sometimes in the other; sometimes it would be used as including such goods, and sometimes such goods would not be included within the use of it. But when he comes to deal with the carrier's sense of the word (and he is a person evidently in the habit of having such goods carried and dealing with them in the way of carriage), he says that "statuary in the literal sense"—that is, in the sense which does not include these goods—he "always understood to be charged at high rates by public carriers, but not statuary in the general sense"; that is to say, this is statuary in the general sense, but that general sense is not the sense in which "statuary" is used, according to his experience, by carriers when speaking of goods which they carry. Now, that is the appellants' own witness. Therefore there is distinctly that piece of evidence, that in the carrying trade, the terms of which would be known to a person dealing in these works, there being two senses, within one of which these goods would come, and within the other of which they would not come, the word "statuary" is used in the sense within which they would not come.

Now, how does the matter stand as regards the other carrying evidence? It is said that statuary is specially dealt with by railway companies at higher rates of charge. Is this "statuary" within the railway sense? It appears to me very doubtful

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whether the word "statuary" alone is considered in railway carrying language as sufficient to cover these articles, because in the railway rates (1) which are put in and relied upon on behalf of the appellants, "statuary" is in terms stated to include terra-cotta statuary. That, to my mind, implies that "statuary" alone, without that definition which extends it to terra-cotta, would not be commonly understood as covering it. Therefore, I own I am unable to find upon the evidence which has been adduced on behalf of the appellants that they have established that, in any sense in which that word can properly be understood as having been used in this contract, these articles are statuary within the meaning of it.

But when we come to look at the correspondence, it seems to me that it is very difficult for the appellants to contend that they are not bound by the interpretation given by the respondents to the language used and not repudiated by the appellants. The quotation having been "for alabaster goods, furniture, &c., but not for goods described as statuary," on the 18th of November, the respondents write: "You seem to make a difference between marble busts and columns and alabaster, while our other quotation is for both cubic and ton weight, 1000 kils., for marble busts and columns. Please let us know about this."

To that letter the answer is sent on the 21st of November. [His Lordship read it as above.] But no allusion is made to the question which is put in the letter of the 18th of November: "You seem to make a difference between marble busts and columns and alabaster, while our other quotation" includes both, as I understand, at the same rate.

Now, what was the meaning which naturally, as I should have thought, would have been attributed to it by the person receiving that letter? The contrast had been drawn in the letter of the 12th of November between "alabaster goods, furniture, &c.," and "goods described as statuary." It is only (so far as I can see) to that distinction that the letter of the 18th could refer where it said: "You seem to make a difference between marble busts and columns and alabaster;" and certainly I should have thought that would have conveyed to the mind of the person

(1) Railway Clearing House Classification of Goods for January, 1888, at p. 66.

receiving the letter this information: "I, Ciceri, asked you for a quotation for marble busts and columns and terra-cotta busts" (because they were all specifically mentioned in the letter of the 26th of October); "you have made a difference between marble busts and columns and alabaster—you have made that difference by differentiating from alabaster articles goods described as statuary. I understand you to mean by 'goods described as statuary' the marble busts and columns to which I have referred, but I do not understand you to mean by it the terra-cotta busts." That seems to me as much implied as if it had been expressed—at all events, that is the interpretation which ought reasonably to have been put upon the letter by the person receiving it. But no reference is made to this question, no answer is given to it, there is no repudiation of the distinction which, as it seems to me, the writer of it draws, and the point to which he addresses his attention, namely, that a distinction is made as amongst the articles which he has mentioned and specified between marble busts and columns and alabaster.

Under these circumstances, especially considering that "goods described as statuary" is a vague term, not capable, as the result has proved, of any very nice definition, it is very difficult for the appellants now to take up the position that, having received that letter, and having left unnoticed that sentence in it, they understood, and have a right to treat, the terra-cotta busts as being statuary, as much included in that expression as the marble busts, and as much distinguished by them from alabaster as marble busts. Therefore, my Lords, I have no hesitation in suggesting that your Lordships ought to affirm on this point the judgment of the Court below.

One other point is made: it is said that in the letter of the 21st of November the appellants point out that the rate quoted does not cover any insurance risks, but simply freight, and it is suggested that the appellants were therefore under none of the liabilities of common carriers—indeed, as far as I understand it, under no liability at all for anything which happened in the course of the transit, inasmuch as that was to be regarded as an insurance risk which they had not undertaken. It seems to me upon this contract, which contains no specific limitation of

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liability, and into which is not imported, as far as I can see, any previous contract, or the terms of any previous contract, or any such general course of dealing as to form part of the contract, impossible to contend that the liability of the appellants was so limited as has been urged before us, especially by Mr. Campbell this morning. They seem to have taken upon themselves all the ordinary liability of a carrier, though no doubt they did not undertake the risks which would commonly fall within the description of "insurance risks." Where insurance risks are thus spoken of in contradistinction to freight, that expression cannot have the wide and extensive meaning which is contended for on the part of the appellants. Of course if it has the more limited meaning only, the contention is wholly immaterial to the point which your Lordships are considering.

On these grounds, I move your Lordships that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

LORD WATSON:—

My Lords, I am of the same opinion. The present case appears to me to illustrate the impropriety of permitting general evidence to be led as to the meaning of words of contract without a distinct averment on record as to the particular words to which the proof is to be directed, and the precise technical or trade meaning which the person making the averment desires to attribute to them. The consequence of disregarding that rule is, that the bulk of the evidence in this case, whilst it might be of some use to a person about to compile a dictionary, is not of the slightest use in construing the contract of the parties. I speak with reference to that part of the evidence which consists of the testimony of Associates of the Royal Academy, professional sculptors, and so forth. I think there are some parts of it which have a bearing, namely, the evidence of those witnesses who are connected with the carrying trade either as carriers or as employers of those who carry. There is very little of that evidence relevant—the greater part of it consisting of individual opinion and not of testimony as to the understanding in the trade of the scope and meaning of the word "statuary," and the custom of the

trade in carrying and paying for articles carried under that descriptive name. So far as relates to that part of the evidence, I entirely agree with the noble and learned Lord who has just spoken, that the appellants have failed to shew that these articles, the value of which is now in controversy, are included in the word "statuary" as understood in the carrying trade.

Then upon the construction of the contract I also agree with his Lordship. The appellants' letter of the 12th of November, 1887, is exceedingly vague in its terms—"not for goods described as statuary." No goods had been described as statuary; but it may have been, and I suppose it was, intended to convey the meaning, "Such goods as in the course of our trade and yours would be described on the present occasion as statuary." Upon two points the respondents ask information, in their reply to that letter of the 12th of November. The first of these points is with regard to "steamer's option," and it is answered in their letter of the 21st by the appellants. The second point relates to "marble busts and columns and alabaster," and the respondents ask an explanation why a distinction is made between these two things as to the prices for carriage. That letter plainly suggests that the respondents understood the expression "goods described as statuary" as referring to the two articles mentioned in their letter of the 26th of October, "marble busts" and "marble columns," and to those only. But whilst an answer is given to the first point upon which information is required, no answer is given to the last. So stood the matter upon this correspondence when these terra-cotta bronzes were sent for carriage; and it humbly appears to me that a failure to give such an explanation in a mercantile correspondence must be assumed as equivalent to an admission that the person who asks the information is quite right in the assumption which he has made, and is entitled to act upon it; and I should be sorry that any such reticence on the part of the person to whom the inquiry is addressed should be otherwise construed.

There is only one other point in the case—and I must say there is very little in it—namely, that these appellants were not carrying as common carriers. It appears to me that, looking at the subject-matter of the contract, they must be held to have under-

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taken the duties and the obligations of common carriers, except in so far as they saved themselves by the exception of maritime risks.

I therefore concur with your Lordship that this appeal should be dismissed with costs.

LORD MORRIS :—

My Lords, I concur in the judgment which has been pronounced by the noble and learned Lords who have preceded me. The main question appears to be a very narrow one, namely, as to the liability of the appellants to pay for the damage sustained by the goods of the respondents. A preliminary, although it has been dealt with as a secondary defence, has been set up at the bar of your Lordships' House, which would go to the root of the action altogether, namely, that the appellants are not bound by the liabilities of a common carrier. I do not think that in the judgment which I am about to pronounce it is necessary to inquire into that question, because there is ample evidence to sustain their liability as carriers in consequence of negligence. There has been a finding by the Court of Session in Scotland, in which I entirely concur as a juror, that the goods were properly packed and placed in their custody, and that they arrived at Edinburgh in an improper state, smashed and broken, and apparently without any cause except the negligence of the appellants or their agents. Upon that ground, in my opinion, there must be a clear liability upon them independently of the question which, as I have said, I think it is unnecessary to decide as to whether they would not be also liable as common carriers, and, incidental to that liability, to have safely and securely carried the goods.

The main question appears to me to turn altogether upon four letters. The first letter is that of the 26th of October, from Ciceri & Co., in which they apprise Sutton & Co., and apprise them correctly, in detail, of the goods which they are going to send, namely, "wooden figures, old cases, marble and terra-cotta busts, marble columns and wood frames." In that letter Sutton & Co., therefore, had the goods properly described to them. They by their letter of the 12th of November mentioned that they

quoted "for alabaster goods, furniture, &c., but not for goods described as statuary." In my opinion, the word "described" there is of some signification. In carrying language, goods might be put under the description of "statuary" which in artistic language would not be so properly described. The words would appear to me to imply that there are a class of goods which would travel in carrying language under the name of "statuary," although possibly not coming within the ordinary or the artistic meaning of that word. They then give a rate and conclude. In reply to that, the letter of the 18th of November, which has been referred to already by the noble and learned Lords who have preceded me, states: "You seem to make a difference between marble busts and columns and alabaster, while our other quotation is for both cubic and ton weight, 1000 kils., for marble busts and columns." That evidently refers to some quotation which they have had from other carriers. In that letter, as it appears to me, they complain that while their other quotation would include marble busts and columns at the same price, Sutton & Co. are drawing some distinction between marble busts and columns and the other things which they were about to send. That appears to me to be the real point of that letter.

The reply given upon the 21st of November is merely a statement that the rates the appellants have given are very low, and that being quoted on the basis of the rates of the steamship companies, they do not cover insurance risks, but are simply for freight. They pass by entirely the distinction which Ciceri & Co. pointed to in their letter between marble busts and the other articles which they were about to send, excluding from that distinction the terra-cotta busts which were referred to by name in the letter of the 26th of October. That evidently to my mind leads to this conclusion, that Ciceri & Co. thought that Sutton & Co. might be raising some question about marble busts, and if damage took place to the marble busts there might possibly arise some other consideration. Upon that I say nothing; but they drop the terra-cotta busts altogether—Ciceri & Co. do not allude to terra-cotta busts, and merely distinguish between marble busts and alabaster. That is accepted, in my opinion, by Sutton & Co.; they accept Ciceri & Co.'s statement in that letter of the 18th

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of November by silence and by passing it over. It would be a most dangerous and unfair mode of dealing with Ciceri & Co. for the appellants to accept the goods which were properly described in Ciceri's letter of the 26th of October, and to which attention was again drawn by the reference to a distinction in their letter of the 18th of November, and then to have been guilty of negligence in the carriage of them.

Therefore I am of opinion that the judgment of the Court of Session should be affirmed.

Interlocutor appealed from affirmed and the appeal dismissed with costs.

Lords' Journals, 25th March, 1890.

Agents for the appellants: *William Robertson & Co., for Wylie, Robertson & Rankin, W.S., Edinburgh.*

Agents for the respondents: *Keeping & Gloag, for Gordon, Petrie & Shand, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

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SIR WILLIAM M'ONIE AND ANOTHER . . APPELLANTS;

AND

WHYTE AND OTHERS . . . . . RESPONDENTS.

Husband and Wife—Post-nuptial Contract—Ante-nuptial becoming Unsuitable—De Presenti Conveyance, or Testamentary Deed—"Heirs and Assignees."

A husband and wife, by post-nuptial contract, dated 1850, reciting that their ante-nuptial contract, dated 1817, had become unsuited to their present circumstances, agreed to a new arrangement of their individual property after the death of the predeceasor. The husband bound himself and his heirs to make payment to the wife, should she survive him, of an annuity during her life of £2000 a year, with the use of his house, furniture, wine, &c. The wife accepted this in full of all legal claims: "And for which causes and on the other part" she "has given, granted, and disponed, as she does hereby give, grant, assign, and dispone from her, her heirs and successors, to and in favour" of the husband, "his heirs and assignees whomsoever, heritably and irredeemably, all and sundry her whole estate, goods, chattels, and effects, heritable and moveable, real and personal, now pertaining and belonging to her, or that shall happen to

pertain and belong to her in any manner of way, and wherever situated, at the time of her death," including her claims under the ante-nuptial contract. She then gave her husband power to uplift the whole heritable and moveable estate, and nominated him "sole executor and universal legator"; and constituted him and his foresaids her assignees, not only to the whole titles of her estate, but also to the rents payable in all time coming from "the last term of Whitsunday." The deed contained a power during the joint lives to alter.

Part of the wife's moveable estate consisted of a share of the residue of her grandfather's estate, given to her in life-rent, exclusive of her husband, with, failing children, a general power of appointment over the corpus. The husband predeceased, bequeathing all his property to trustees. The husband's representatives, on the ground that this fund had not vested in the husband, claimed it as conditional institutes in the post-nuptial contract:—

Held, reversing the decision of the Court of Session, that the post-nuptial contract was not a testamentary deed, but a deed of mutual contract, and that the right which each party obtained was a right of credit which vested at once, and therefore the share of residue passed by the husband's will and vested in his trustees.

APPEAL against part of an interlocutor of the First Division of the Court of Session, pronounced (1) in a special case to which the appellants, trustees under the late Mr. James Buchanan's trust disposition for the interest of the city of Glasgow, were second parties; and the respondents, who were heirs in mobilibus of Mr. Buchanan, and representatives of deceased heirs, were third parties.

The first parties were merely the holders of the fund in question, being the trustees of the late Mr. James Rodger, who died in 1834, and who was the grandfather of Mrs. Buchanan.

Mr. Rodger, by the 5th codicil to his trust disposition, which was dated the 3rd of August, 1831, cancelled previous provisions to Mrs. Buchanan, and directed his trustees to make payment to her of certain sums, exclusive of jus mariti, and declared she should have the same share of the residue of his estate as any other grandchild. By the 7th codicil he gave her an additional legacy. These legacies have been paid. By the 9th codicil, dated the 3rd of September, 1833, the testator directed: "Secondly, that the share in the residue of my estate, directed to be set apart for my granddaughters, shall be secured by my

(1) March 18, 1887.

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trustees to them in life-rent for their life-rent use allenarly (seclusive of the jus mariti of their respective husbands, &c.), and to their respective children equally among them in fee, and failing any of them without children, then to any person or persons whom they may appoint by a writing under their hands."

Mr. and Mrs. Buchanan were parties to an ante-nuptial contract of marriage in 1817, and to a post-nuptial contract in 1850. Mr. Buchanan died in 1857, aged seventy-two; and Mrs. Buchanan in 1883, aged eighty-six, without issue. On the death of the latter two questions arose: (1) Whether the power of appointment over the share of the residue of her grandfather's estate had been properly exercised by the general conveyance in her post-nuptial contract. The Court of Session held it had been, and no question is raised as to that decision in this appeal. The second question, and the only one in this appeal, was whether, assuming the power of appointment was validly exercised, the share of residue, amounting to about £4105, now belonged to the testamentary trustees of Mr. Buchanan, the appellants, or to Mr. Buchanan's heirs in mobilibus ab intestato, the respondents.

By the ante-nuptial contract Mr. Buchanan came under an obligation for payment of £4000 if Mrs. Buchanan survived him, to be invested upon heritable security, for an annuity for her. And, further, he renounced his legal rights. Mrs. Buchanan accepted this provision as in full of her legal rights.

On the 10th of June, 1850, they executed the above-mentioned post-nuptial contract. Mrs. Buchanan was then childless, and fifty-three years of age. The spouses were residing in the house, 49, Moray Place, Edinburgh.

The post-nuptial contract recited that, in view of the unsuitableness of the ante-nuptual contract of marriage to their present circumstances, and for the love they bore each other, they entered into it. By this deed Mr. Buchanan bound himself and his heirs to pay to his wife during all the days of her life, in case she should survive him, the sum of £2000 yearly. And he "alienated and disponed, and he does hereby alienate and dispone to and in favour of his wife in life-rent, for her life-rent use allenarly after his death," the piece of ground and dwelling-

house, No. 49, Moray Place, with entry immediately after his death. And further bound himself that if he should sell the said house during his life then she was to be entitled to the life-rent use of any other dwelling-house belonging to him at the time of his death, with the life-rent of his whole furniture and plenishings, &c., in that or any other house possessed by him; Mrs. Buchanan being taken bound to repair the said house, so as to maintain it as a tenantable habitation for herself.

Mrs. Buchanan accepted these provisions in full satisfaction of her legal claims, saving her provisions under these presents.

"For which causes, and on the other part, she, the said Jane Jack or Buchanan, has given, granted, and disponed, as she does hereby give, grant, assign, and dispone, from her, her heirs and successors, to and in favour of the said James Buchanan, his heirs and assignees whomsoever, heritably and irredeemably, all and sundry her the said Jane Jack or Buchanan's whole estate, goods, chattels, and effects, heritable and moveable, real and personal, now pertaining and belonging to her, or that shall happen to pertain and belong to her in any manner of way, and wherever situated, at the time of her death," including and comprehending all sums of money to which she is or may be entitled under the ante-nuptial contract, and all her provisions under that contract, with the whole vouchers and conveyances of said estate, heritable or moveable, real or personal, together with all interest she can claim to the said estate and effects pertaining and belonging to her at the time aforesaid of her death, dispensing with the generality hereof, and declaring the same to be as valid and effectual as if the whole estate, heritable and moveable, &c., belonging to her were herein particularly described. "Moreover, she hereby binds and obliges herself, and her heirs and successors, to infeft and seize the said James Buchanan, and his heirs and assignees, in the whole lands and other heritages above disponed, requiring infeftment, and to make, grant, subscribe, and deliver to him and his foresaids all writs, &c., containing clauses necessary for fully vesting and establishing the premises in their persons; with power to the said James Buchanan and his foresaids to call and pursue for, uplift, receive, and discharge the whole estate and effects, heritable and moveable, real and

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personal, hereby assigned and disponed, and generally to do everything in relation to the premises which she, the said Jane Jack or Buchanan, might have done before granting hereof; and she, the said Jane Jack or Buchanan, does hereby nominate and appoint the said James Buchanan to be her sole executor and universal legator, excluding all others therefrom." Further, she constituted Mr. Buchanan and his foresaids her cessioners and assignees, not only to the whole titles of the said lands and others, "but also in and to the rents, maills, and duties of the said lands and others due and payable for and furth thereof, from and since the term of Whitsunday last, which is hereby declared to have been the term of the said James Buchanan's entry to the said subjects, and in all time coming surrogating hereby and substituting the said James Buchanan and his foresaids in her full right and place of the premises for ever, which lands and others above disponed, with this right and disposition of the same, and infeftments to follow hereon, with the assignation above written to the writs and evidents, the said Jane Jack or Buchanan binds and obliges herself and her foresaids to warrant to the said James Buchanan and his foresaids to be free of all burdens and incumbrances and grounds of eviction whatever. And further, she relieved him of all feu duties, &c., exigible out of the said subjects, preceding the said term of Whitsunday last: "The said James Buchanan and his foresaids being bound to relieve her and her foresaids of the same thereafter in all time coming." And she has herewith delivered up to the said James Buchanan the title-deeds of the said subjects, declaring always that he shall have full liberty to sell and dispone the house, 49, Moray Place, either gratuitously or otherwise, but always under the condition that he shall immediately secure her in the life-rent, use, and possession during all the days of her life of any similar dwelling-house in which the parties may happen to reside at the death of the said James Buchanan. The deed then reserved to James Buchanan, during the joint lives of the parties, his life-rent right of the sums and subjects disponed and assigned by him as above mentioned to his wife; and "also reserved power to both of them, during their joint lives, to alter these presents in whole or in part, as they may think fit." It also declared that

these presents should be valid, although not delivered during the joint lives of the parties, but found in the custody of the survivor of them, or in the custody of any other person at the death of both or either.

Mrs. Buchanan received the income of her portion of the residue of her grandfather's estate as usual, from 1850 until her death. She left no general will or trust disposition relating to the share of residue in question. Mr. Buchanan left a trust disposition dated the 17th of February, 1852, and three codicils dated 1857, containing a general conveyance of his whole estate to trustees, whom the appellants represent.

On the 18th of March, 1887 (1) the First Division of the

(1) THE LORD PRESIDENT (Lord Inglis) (after saying the conveyance, as exercising the power under her grandfather's will, was sufficient in its terms to embrace all that she was in right to at the time, and that the power was well exercised), continued :—

The next question comes to be, whether the fund which was thus appointed was carried by Mr. Buchanan's trust disposition and settlement to the trustees therein named. Now, that depends entirely upon the nature of the deed which Mrs. Buchanan made. The post-nuptial contract deed which we have here is certainly a deed requiring a good deal of attention, and not very easy to construe, for there are mixed up in it a good many clauses which appear to me to harmonize with the notion of it being a de presenti conveyance to take immediate effect, and others, again, which give it a very testamentary character; and whether it is in whole of a testamentary character or not, we have to determine at least whether it is a testamentary deed as regards the appointed fund. Now, as regards the heritable estate of Mrs. Buchanan, if that question were directly before us, I must say, I should have great difficulty in arriving at a conclusion because, although there are a great many words that seem to indicate an intention to vest in Mr. Buchanan a right by infeftment to the heritable estate immediately upon the execution of this deed, there are others again, even in that part of the deed, which have an opposite effect, for in those clauses to which I am referring, the estate is thus described: "The whole estate, goods, chattels, and effects, heritable and moveable, real and personal," pertaining and belonging to her at the time of her death; and that looks as if the heritable as well as the moveable estate could not belong to Mr. Buchanan until after his wife's death. But although a difficulty might exist if I were dealing with the heritable estate, I confess I have not much difficulty as regards the moveables. In the first place, I think the words in which the conveyance is made are of a testamentary character. She gives grants and conveys to and in favour of her husband, his heirs and assignees whomsoever, heritably and irredeemably, "all and sundry her the said Jane Jack or Buchanan's whole estate, goods, chattels, and effects, heritable and moveable, real and personal, now pertaining and belonging to her, or that shall happen to pertain and belong to her in any manner of way and wherever situated

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Court of Session pronounced this interlocutor: "Find, that Mrs. Buchanan validly exercised the power of appointment con-

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at the time of her death." Now, these are the ordinary words of a testamentary settlement. If she had been conveying to trustees for testamentary purposes that is just the very clause by which she would have expressed her intention to convey her estate as at the time of her death. The words "now pertaining and belonging" have really no legal effect at all, for nothing could go to the trustees at her death except the estate which belonged to her. And then, in the next place, it must be observed that Mr. Buchanan is appointed her sole executor and universal legator. Now that has certainly a very testamentary appearance, and I do not see what the use of that appointment would be at all if he were to acquire right to the whole estate, heritable and moveable. Then, again, the deed is looked upon by both parties as a settlement to take effect at death, seeing that they reserve power during their joint lives "to alter these presents," and that certainly looks as if the deed were to receive effect immediately on the death of the wife. And then there comes a clause dispensing with delivery—a clause that one never finds except in testamentary deeds; and so far as the moveable estate is concerned, I have come to the conclusion that this is the testamentary deed of Mrs. Buchanan. Now, if that be so, we must give effect to the words in which she has expressed her intention to give her estate to "James Buchanan, his heirs and assignees whomsoever." I think, according to the ordinary construction of these words, as settled in our law very conclusively, that the event of James Buchanan, the husband, predeceasing the maker of this bequest, lets in his heirs as conditional institutes, and it appears to me, therefore, that the third parties here, the heirs in mobilibus of Mr. Buchanan, ab intestato, are entitled to succeed.

LORD MURE (after stating that he considered that the power given to Mrs. Buchanan in her grandfather's will had been properly exercised) continued:—

I take the same view as your Lordship, and that it was the nature of this post-nuptial contract to make a settlement between the parties of something that has been forgotten at the time of the marriage. They wanted to make a new settlement, and so each party provides for something that is to take place after the death of the other. I always understood that a marriage contract is a kind of thing that is meant to regulate the position of parties and their families after their death, and they are, or are intended to be, substantially of a testamentary nature. And although there may be provisions in a marriage contract of a de presenti nature, that cannot, I think, have the effect of derogating from the general conveyance; and although there may be provisions inserted to regulate certain things during the lifetime of the parties, these cannot be held in the ordinary case to do away with this testamentary character. No doubt there is here a peculiarity in the phraseology which causes the difficulty that arises; but what I have just said leads me to think that this deed is of a testamentary character, and that by virtue of the clauses to which your Lordship has referred, this fund must go in respect of Mr. Buchanan's death to his representatives.

LORDS SHAND and ADAM were of the same opinion.

ferred upon her by Mr. Rodger by the general conveyance of her estate to her husband, his heirs and assignees whomsoever, in the post-nuptial contract entered into between her and her husband, *and that the third parties are entitled to the share of the residue life-rented by Mrs. Buchanan under the said destination, being the fund in dispute, as heirs in mobilibus of Mr. Buchanan ab intestato, and as such conditional institutes under the conveyance by Mrs. Buchanan in said post-nuptial contract of marriage*, and decern."

Against the portion printed in italics this appeal was brought.

Feb. 25. *The Lord Advocate* (*J. P. B. Robertson*, Q.C.), and *Finlay*, Q.C. (with them *A. Mitchell*, of the Scotch Bar), for the appellants:—

The Court of Session were clearly wrong. The judges failed to appreciate that this was a contract for onerous conditions, mutual and remuneratory, and not less onerous because post-nuptial. It is a de presenti conveyance to the husband, and carried by his will. The right under her grandfather's will was for all practical purposes the wife's absolute property, and her appointment was under Scotch Law, and now also by English law, good. She does not give her husband the income of the fund during her life because she held it ex jus mariti, but she gives him the power to dispose of the fund after it falls in. There is no mention of children, and it must be taken as a provision for the husband. The husband burdened himself to pay a large annuity, should he predecease, with the life-rent use of their house or any other house they lived in, and the wife grants to her husband as her counterpart for the provisions made for her, her "whole estate," transmissible to his assignees, whether he survived the period of payment or not. The words, "all and sundry" convey the universitas present and to come. The Court of Session appear to have drawn a distinction between heritable and moveable estate, although the same clause deals with both. If the heritage vested de presenti so also must the moveable property. As to the heritage there is no difficulty. It is a complete de presenti conveyance. He is to have the writs and whole rents from "Whitsunday last," relieving her thereafter of the outgoings in the way of rates, &c. There is an express power to each party to revoke

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wife deals only with what she has at death. It is not suggested during their joint lives, and by consent of both, but if not exercised the reservation is gone, and the post-nuptial contract is just as much a contract as if executed between two independent parties. The respondents rely on the expression of a testamentary character making the husband "executor and general legator"; but those words were only inserted to give him power to gather together anything left out, or after-acquired property. The husband takes so much out of his estate to support the burden he stipulates to pay, and it is reasonable that the benefit he in return is granted should go in the same way.

Sir Charles Pearson, and *James Wallace* (of the Scotch Bar), for the respondents:—

It is not contended that this deed has not words of the nature of contract, but it has also words of a testamentary description. As regards moveables, it does not follow because the husband's part at first sight appears to be a de presenti conveyance that the wife's is also. By paction spouses may proceed to make a mutual will, but its nature and character remain testamentary, although not revocable; therefore irrevocability is no test. Then the husband's part of the deed contains provisions in favour of the wife, which only come into operation on his decease, and therefore it is not inconsistent that when you come to the wife's part to say that it should go to the person the wife says it should. The question is whether the husband has not stipulated that it shall go to him, his heirs and assignees. There is nothing unnatural in that, when it is seen she takes nothing if she predecease him; and then if a party predecease the vesting of a gift to him and his heirs and assignees, "his heirs" in Scotch law, as conditional institutes, will take. The appearance of the word "assignees" seems to give power to assign, but it does not until the fee is actually vested, and therefore the interjection of "assignees" does not make the case any worse for the respondents: *Graham* v. *Hope* (1). The words shall pertain "at the time of her death" are appropriate words of a will. The appointment as "executor and universal legator" has nothing to do with present or after acquisitions, because the

(1) Mor. Dict. "Legacy," Ap. No. 3.

the wife could after the husband's death defeat the rights of the husband's heirs, especially if she took the annuity, but it must be remembered that although the clause of revocation and that dispensing with delivery may be found in a mutual contract they are always found in a will. The husband must be held to have conditioned for the fund to go to his heirs and assignees, which involved that if he predeceased his wife then the heirs should come forward and succeed; and the other parts of the deed square with that. There was no inequality, for if the wife did not survive she took nothing. The judgment appealed from, therefore, ought to be affirmed.

LORD HALSBURY, L.C. :—

My Lords, I think it is unnecessary to hear the reply in this case. But for the respect which one must entertain for judges dealing with such a subject as the Court of Session were here dealing with, namely, a matter of Scotch conveyancing, I should have thought that this was a particularly plain case. I am unable to read this instrument as other than what it is; and the history of the instrument appears to me to be not immaterial.

These spouses in the year 1817 entered into an ante-nuptial contract, and in the year 1850 they recite that "it is matrimonially contracted and agreed upon between" them "in manner following, that is to say, the said parties, taking into consideration that the provisions in the contract of marriage entered into by them at the time of their marriage are not suitable to their present circumstances, have in order to supply that defect"—and then they proceed with the different provisions of the deed. The whole argument is apparently reduced to the single question whether the passage B and C (1) is intended to have a present actual operation under the circumstances of this deed, it being a mutual deed, and each giving to the other something by way of contract, or whether it is only intended to be a testamentary disposition and to operate only after the death of the parties.

I confess that with the single exception of the passage at the bottom of page 8 (2), in which there is the appointment of

(1) Reference to printed case, but the passage is given ante, p. 159, eleventh line.
(2) Reference to printed case, but see ante, p. 160.

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Lord Halsbury, L.C.

Mr. James Buchanan by Mrs. Buchanan as her sole executor and universal legator, I am unable to see anything in this deed other than language and provisions appropriate to a deed such as it purports upon the face of it to be, namely, a matrimonial contract between the parties, each undoubtedly in some respects giving presently something to the other; and in respect of the heritable property apparently the Lord President impliedly admits that if that question were before him, and he had to decide that question alone, although the phrase which his Lordship uses is that he would have great difficulty in determining it either way, I think the obvious intuitus of his Lordship's observation is that he would have to decide that it had a present operation; and indeed whether that was what the Lord President meant or not, it certainly must be so when one looks at the other provisions of the deed. There was to be an absolute transfer of the heritable property; there was to be a burden taken from the one to the other, and the actual time when the transfer of the property was to date from is specified by the instrument itself.

Then the question which your Lordships are asked to solve, is whether these words which contain all these subject-matters of property in one clause and are operated upon by the same verb are to have a different construction according to whether you are dealing with the moveable or with the heritable estate. My Lords, I confess that I am unable to see my way to regard as plausible the contention on the other side; and I would only like to say, with respect to the principle which Lord Mure appears to lay down, that I entirely deny that a marriage contract between the parties is a thing which is meant to regulate the position of the parties and of their family after their death, and that the provisions of that contract are or are intended, at least substantially, to be of a testamentary nature. I believe that it would be impossible to lay down such a canon of construction for marriage contracts upon such a ground. In ninety-nine cases out of a hundred I should think that a marriage contract does provide and is intended to provide for the relations of the parties during their lifetime; and although it may and very often does provide for the destination of the property after the death of the parties or of one of those parties, yet the provisions of the

instrument itself are primarily intended as much and even more to regulate the reciprocal rights of the parties during the continuance of the marriage than to determine the destination of the several properties contained in the instrument after their death.

For these reasons, my Lords, I am unable to concur with the judgment of the Court of Session. I speak with the utmost respect for the learned judges who have arrived at the conclusion to which they have come. I should have had more hesitation in disagreeing with them if the reasons given for their judgment had been more satisfactory upon the face of them. Some of the judgments are mere concurrences; and with reference to the judgment of the Lord President, whose judgment appears to be the leading judgment, it is a very remarkable fact that, in giving his reasons for his conclusion upon that which is the only real controversy in the case, he unconsciously misquotes the language of the instrument upon which he is relying, and misquotes it on a very vital matter. Under these circumstances I move your Lordships that this interlocutor be reversed.

LORD WATSON:—

My Lords, the document which we have to construe in this case is not a very artistic production. It contains passages which may be said to be inconsistent with each other. It also contains at least one provision which is commonly found in a will or testamentary disposition. I refer to the clause appointing Mr. Buchanan to be the sole executor and universal legator of his wife. But, after all, the character of the deed and of the leading provisions of the deed cannot be determined by a reference to clauses of that kind. We must look to the provisions themselves—we must look to the whole tenor and purpose of the deed, and to the arrangement that is embodied in the leading clauses, and more particularly in that clause which it is our duty to construe.

Now, the result of the examination of the deed, to which I have listened with pleasure from both sides of the bar, has been to satisfy me that it is in reality and in substance a deed of contract between two spouses, not intended to affect and not purporting to affect the interests of third parties or to constitute any rights in

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favour of third parties, which might probably have been held to be testamentary in their nature. The deed comes in lieu of a previous contract between the parties, executed before marriage for the purpose of settling their rights and interests in each other's property, and in particular settling the interests which they were to take in the property of each other after the death of the first deceasor.

It has been suggested that the language in which Mrs. Buchanan gives, grants, and dispones to her husband is such as might be expected in a testamentary deed. I do not doubt it. It is also language which might be naturally expected in what I venture to call a deed inter vivos but mortis causâ in contradistinction to a testamentary deed. But this is not only a deed inter vivos with that view—it is a deed of contract. The parties bind each other, and they each make a conveyance in implement of these obligations. It was suggested that the clause of conveyance might be read thus, as giving an immediate right to Mr. Buchanan to all the property heritable and moveable of which his wife then stood possessed, with a right to subsequent acquirenda of his spouse not exigible until the date of her death. There is some plausibility in that reading; but it is a little difficult to hold that it is the right construction upon comparing it with the terms in which, on the same page of the print, the lady conveys all right and title to estate vested in her at the time of her death. But whichever way you read it, whether the property is to pass at her death or before her death, part of it at least is not to pass until that time; and in that view the appointment of Mr. Buchanan to be her executor and universal legatory might give him a useful ancillary title for the purpose of enabling him to get in the estate which was conveyed to him.

But I do not desire to rest my decision in this case upon any of these peculiarities. I think the appellants are entitled to judgment on this broad ground, that the deed is a deed of contract—that the right which each party gets to the estate of the other is the right of a creditor and not of a legatee—that each has a right of credit which vests at once. In that view of the deed I do not think it admits of dispute, that according to the law of Scotland, "A. and his heirs and assigns" simply means a

present right of credit in A., no matter how long the enforcement of it may be delayed.

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LORDS BRAMWELL and HERSCHELL were entirely of the same opinion.

Ordered, that the interlocutor of the 18th of March, 1887, in so far as the same is appealed against be reversed; and Found that the second parties (the appellants), as the testamentary trustees and assignees of Mr. Buchanan, are entitled to the fund in dispute; and Further Ordered, that the parties at the Bar by their counsel consenting thereto, the costs of the appellants and respondents, in respect of this appeal, be paid out of the said fund; Cause remitted to the Court of Session in Scotland, to do therein as shall be just and consistent with this Finding and Judgment.

Lords' Journals, 25th February, 1890.

Agents for appellants: *Loch & Goodhart, for R. R. Simpson & Lawson, W.S., Edinburgh.*

Agents for the respondents: *Wilkins, Blyth, & Dutton, for John Rhind, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

JOHN INGLIS, JUN. . . . . APPELLANT;

AND

INGLIS OR BREEN AND ANOTHER . . . RESPONDENTS.

H. L (Sc.) 1890 *March* 3.

Succession—Election between provisions under Father's Will and Legitim—Essential Error—Appeal withdrawn—Form of Order.

APPEAL from a judgment of the First Division of the Court of Session, Scotland (1), adhering to the decision of the Lord Ordinary, Lord Trayner.

March 3. *The Lord Advocate* (*J. P. B. Robertson*, Q.C.) (with him, *Rigby*, Q.C.), having opened the case, and their Lordships

(1) 14 Court Sess. Cas. 4th Series, 740.

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having made certain observations unfavourable to the success of the appeal, he asked leave to withdraw the appeal.

Asher, Q.C., and *C. J. Guthrie* (both of the Scotch Bar) appeared for the respondents.

THE HOUSE (Lords Herschell, Watson, Macnaghten, and Morris), without giving any opinion on the merits, pronounced the following order:—

> *That the appellant having asked leave to abandon the appeal, and due consideration being had of what had been offered for the appellant; Ordered, that the interlocutors appealed from be affirmed, and the appeal dismissed with costs.*

Lords' Journals, 3rd March, 1890.

Agents for appellant: *Grahames, Currey & Spens, for Webster, Will, & Ritchie, S.S.C., Edinburgh.*

Agents for respondents: *Andrew Beveridge, for Kidstons, Watson, Turnbull, & Co., Glasgow, and H. B. & F. J. Dewar, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1890 *April* 25.

RACHEL ISABELLA LOCKHART OR BEGG (PAUPER) . . . . . } APPELLANT;

AND

CHARLES BEGG . . . . . RESPONDENT.

Divorce—Evidence—Adultery—Perjury—Wife's Costs refused.

APPEALS brought by Mrs. Begg against two decisions of the Second Division of the Court of Session (1), Scotland.

The first appeal questioned a judgment of divorce for adultery, granted at the husband's instance, as not being warranted by the evidence; and the second was against a judgment in an action afterwards raised by the wife for reduction of the decree of

(1) 14 and 16 Court Sess. Cas. 4th Series, at pp. 497, 550 respectively.

divorce on the ground that it had been obtained by subornation of perjury.

The questions raised were simply as to the facts; but as the actions were reported in the Court of Session it is thought necessary to state the result of the appeals.

The adultery alleged was with one co-respondent, and the case now depended entirely on the credit to be attached to the evidence of two witnesses, husband and wife.

Sir *Charles Russell*, Q.C., and *Robert Johnstone* (with them *G. W. Burnet*, both the latter of the Scotch Bar) appeared for the appellant.

The Dean of Faculty (*J. B. Balfour*, Q.C.), and *Finlay*, Q.C., for the respondent, not heard.

THE HOUSE, Lords Herschell, Watson, and Morris (Lord Morris doubting in the first appeal), affirmed the decisions of the Court of Session, and dismissed both appeals.

An application for the appellant's costs in the divorce appeal was refused, on the ground that the rule laid down by the Lord Justice-Clerk (Lord Moncreiff) in *Kirk* v. *Kirk* (1), "that as long as the wife has a probable ground of defence she may defend herself to the end at her husband's expense; and cases may be imagined in which she would be entitled to go to the House of Lords," has been considerably modified. The proper rule being that, except in a very exceptional case, the wife is not entitled to be paid her costs by her husband, except upon the theory that she is still his wife. And that here the appellant had the judgment of the Lord Ordinary and that of the Inner House against her, that she had been guilty of a matrimonial offence, and had ceased to be the wife of the respondent.

Lords' Journals, 25th April, 1890.

Agents for appellant: *Fardells, Dashwood, & Canning, for Robert Stewart, S.S.C., Edinburgh.*

Agents for respondent: *William Robertson & Co., for Stuart & Stuart, W.S., Edinburgh.*

(1) 3 Court Sess. Cas. 4th Series, at p. 129.

[PRIVY COUNCIL.]

J. C.*
1889
June 18, 19, 20, 21, 25, 26; Dec 14.

In re THE ENDOWED SCHOOLS ACT, 1869, AND AMENDING ACTS,

AND

In re THE SCHEME RELATING TO CHRIST'S HOSPITAL UNDER THE SAID ACTS.

Endowed Schools Act, 1869 (c. 56), ss. 5, 11, 13, 14 (1), 16, 29, 39 (3), 42—*Educational Endowments—Vested Interests—Rights of Patronage—Conscience Clauses.*

Held, that the original site of Christ's Hospital and the gifts made to it having been continuously applied to education by a governing body separately established for that purpose, such endowments are educational within the meaning of s. 5 of the Endowed Schools Act, 1869, and also that endowments applied to the maintenance of scholars are educational under s. 29.

Held, that endowments given subsequently to the 2nd of August, 1819, and legitimately spent in improving or maintaining the hospital property, need not be traced and excluded from the Commissioners' scheme as requiring the consent of the governing body thereto under s. 14 (1).

Held, that the scheme requiring persons in charge of a boarding-house to allow their boarders exemptions from prayers and religious worship was in that respect unauthorized by the Act. Provision should be made under s. 16 to enable the scholar obtaining such exemptions to attend the school as a day scholar.

Held, that Donation Governors having rights of patronage are entitled to be heard on the question, whether the scheme is or is not in conformity with s. 39 (3), as being persons directly affected thereby. Rights of patronage, however, are not vested interests under s. 13, or educational interests under s. 11. A scheme which pays regard not illusory but substantial to those rights conforms to the Act.

Held, that the Corporation of the City of London being a portion of the governing body, and legally seised of the estates of the Hospital, but without powers of management, is not the governing body under s. 39, and has no locus standi in that capacity.

Held, that Guy's Hospital, being by the terms of its foundation liable to pay an annuity to Christ's Hospital, and only possessing rights of patronage

* *Present*:—THE LORD CHANCELLOR (LORD HALSBURY), THE EARL OF SELBORNE, LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR MONTAGUE E. SMITH.

corresponding thereto, without powers of management, has no locus standi under s. 39.

Held, that under s. 42 an appeal having relation to an endowment, the average gross annual income of which during the three years next before the commencement of the Act is not more than £100, cannot be entertained.

THERE were originally twenty-eight appeals to Her Majesty in Council under the above-mentioned Act of 1869, s. 39, amended by s. 14 of the Act of 1873, against a scheme of the Charity Commissioners in relation to Christ's Hospital.

The nature of the scheme, so far as is material, and the grounds upon which the appeals were made, appear in the judgment of their Lordships.

Rigby, Q.C., and *Vaughan Hawkins*, in support of the appeal of the Governors of Christ's Hospital, contended that the scheme was erroneous, and that the approval of Her Majesty in Council should be withheld. It affected to deal with schools and endowments which by s. 8 were excluded from its operation, as being applicable, in the discretion of the governing body, to other objects than educational purposes and existing schools. It dealt with endowments and parts of endowments which are only in part educational, being as to more than one half applicable and applied to other uses. The scheme is not in conformity with s. 24, and is not made with the assent of the Governors. Again, the scheme diverts funds applicable to charitable uses from such uses, and alters the governing body in reference to all the endowments dealt with thereby. Endowments originally given to charitable uses, less than fifty years before 1869, and not mixed with old endowments, as mentioned in s. 25, have been improperly interfered with. Regulations made under the founder's authority, within fifty years from his death, and observed down to the date of the Act, require that scholars should be instructed according to the doctrines and formularies of the Church of England. These have been violated by certain provisions of the scheme. Reference was made to s. 19, sub-s. 2, and s. 16 of the Act of 1869. The scheme accordingly alters the nature and scope of the charity. It abolishes the discretionary powers under the original charter, and it interferes with instead of

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carrying out the designs of the founder. Reference was made to *Clephane* v. *Lord Provost of Edinburgh* (1); *In re Hallett* (2), which lays down the doctrine as to earmarking the funds ignored by the Commissioners in this case: *In re St. Leonard, Shoreditch, Parochial Schools* (3).

Vaughan Hawkins, for the Donation Governors, contended (Sir *Horace Davey* objecting to their locus standi for appealing) that due and proper regard had not been paid to their rights of patronage. These rights were exercised by the appellants at the date of the Act as members of the governing body, in consequence of donations made by them. He referred to *In re Shaftoe's Charity* (4).

Sir *A. Watson*, Q.C., and *Tweedy*, for the Mayor and Commonalty and Citizens of London, referred to *In re Sutton Coldfield Grammar School* (5), and *In re Hemsworth Grammar School* (6).

H. B. Howard (*Rigby*, Q.C., with him), for the President and Governors of Guy's Hospital, referred to *Attorney-General* v. *Christ's Hospital* (7).

Finlay, Q.C., and *Methold*, for the Fishmongers' Company.

[Lord Selborne referred to s. 42 of the Act of 1869.]

The Lord Chancellor:—Their Lordships do not desire to hear the respondents in reference to the appeals of the City of London and the Donation Governors, or with respect to the appeal of the governing body upon the point whether or not the general resources of Christ's Hospital should be excluded from the scheme as not being an educational endowment within the meaning of the Act.

Sir *Horace Davey*, Q.C., and *Romer*, Q.C., (*Joyce*, with them), for the respondents, the Charity Commissioners, contended with

(1) 4 Macq. 603; Law Rep. H. L., Sc. 417.
(2) 15 Ch. D. 696.
(3) 10 App. Cas. 304.
(4) 3 App. Cas. 872.
(5) 7 App. Cas. 91.
(6) 12 App. Cas. 449.
(7) 1 Russ. & M. 626.

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regard to those endowments which had been given since 1819, and expended as mentioned in sect. 25, that they had become so mixed with old endowments that it was impossible to separate them. Reference was made to sect. 4 and sect. 14, sub-s. 1 of the Act of 1869. With regard to such recent endowments as instead of having been expended have been mixed with other investments representing old endowments a fair apportionment has been made. It was contended that all endowments subject to sect. 14, sub-s. 1, have been dealt with in the scheme in accordance with the provisions of that sub-section. With regard to the objection under the conscience clause, it was not shewn and it did not appear that the scholars were required to be instructed according to the doctrines or formularies of any particular church or sect, so as to bring the endowments within the exemption in sect. 19 of the Act. It was therefore contended that the scheme was in accordance with sects. 15 & 16 of the Act. With regard to the appeal of Guy's Hospital, it was contended that the appellants had no locus standi, not being in respect of their payments or otherwise members of the governing body of Christ's Hospital. They had no vested interest such as required to be saved or compensated under sect. 13. The scheme had due regard to all educational interests and all rights of patronage to which it was the duty of the respondents to have regard. With regard to the appeal of the Fishmongers' Company they are not members of the governing body, and have no locus standi. Nor have they any vested interest. Reference was made to sects. 28 and 42 of the Act.

Rigby, Q.C., replied for the Governors of Christ's Hospital, and for Guy's Hospital.

Methold, replied for the Fishmongers' Company.

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The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

The scheme framed by the Charity Commissioners in this case has given rise to a great number of appeals, five of which have been argued before their Lordships. They are as follows:—

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A.—An appeal by the Governors of Christ's Hospital as constituted by Act of Parliament, 22 Geo. 3, c. 77.

B.—Nine appeals by Donation Governors of the Hospital, now heard as a single appeal.

C.—An appeal by the Corporation of the City of London and by the Lord Mayor, aldermen, and certain common councillors, members of the acting governing body of the hospital.

D.—An appeal by Guy's Hospital.

E.—An appeal by the Fishmongers' Company.

These appeals raise questions affecting the general character and objects of the foundation as well as its governing body: and it will be convenient first to state the material parts of the instruments which determine those points.

In December, 1547, King Henry VIII. executed an indenture and letters patent by which he granted to the Corporation of the City of London the church of the late Grey Friars (thenceforth to be called Christ Church), and the site of their house and other property lately belonging to the Grey Friars and to the hospital of St. Bartholomew. He also granted to them licence to hold lands to the extent of 1,000 marks a year.

The king's motive for the grant is thus described in the recitals of the indenture:—

"The Kinge consideringe the myserable estate of the poore aged sick sore and ympotente people as well men as women lyinge and goinge about begginge in the common streates of the saide Cittye of London and the Suburbes of the same to the greate paine and sorrow of the same poore aged sick and ympotente people to the greate infeccion hurte and noyance of his Grace's lovinge subjectes which of necessitie muste dailie goe and passe by the same poore sick sore and ympotente people beinge infected with divers greate and horrible sicknesses and disseases his highness of his moste bountifull goodness and charitable mynde mooved with greate pittye for and toward the reliefe aide succour and helpe of the said poore aged sick sore and impotente people and for thadvoydinge of the great daunger and infeccion which dailye dooth and maye ensue to his lovinge subjectes by reason of the greate sicknesses and horrible

diseases of the same sick and sore people and for dyvers other good and godlie purposes and intentes."

By the indenture the corporation covenanted that they would maintain certain clergy and almspeople, with details not material for the present purpose; and that besides the specified objects, the whole profits of the lands then granted or to be taken under the licence should go to the relief and sustentation of the poor.

In the month of June, 1553, King Edward VI. executed an indenture and letters patent by which he granted to the corporation of the city of London his manor house of Bridewell, and all the possessions belonging to the late hospital of the Savoy. He also granted to them power to hold lands to the yearly value of 4,000 marks "to the use and sustentation of the poor of the new erected Hospital of Christ Church in London for the time being, and to the sustentation of the poor of the new erected Hospital of St. Thomas in the borough of Southwark in the county of Surrey for the time being, and to the sustentation of the poor from henceforth to be found and brought up in the said Manor House or place of Bridewell."

The King's motive for the grant is thus stated in the indenture:—

"The King of his mere mercy having pity and compassion on the miserable estate of the poor fatherless and motherless children and sick sore and impotent people and most graciously considering the good and godly endeavours of his most humble and obedient subjects the mayor and commonalty and citizens of London who diligently by all ways and means do travail for the good provision of the said poor and every sort of them and that by such sort and means as neither the child in his infancy shall want virtuous education and bringing up neither when the same shall grow unto full age shall lack matter whereon the same may virtuously occupy himself in good occupation or science profitable to the commonweal neither the sore nor sick when they shall be healed shall be permitted nor suffered to wander as vagabonds in the commonweal but shall likewise be put to labour and good and wholesome exercise and so be made profitable members of the same."

In this record are printed, under the head of "The Order

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of the Hospitals of King Henry VIII. and King Edward VI., viz., St. Bartholomew's, Christ's, Bridewell, St. Thomas's," certain ordinances made by the Corporation of London as governors of those hospitals. It appears that they established a general body of governors for the joint affairs of the four hospitals, with separate bodies for the separate affairs of each. And it is mentioned that in Christ's Hospital there was a grammar school in which "suche of the children as be pregnant and very apt to learninge be reserved and kept . . . in hope of preferment to the universitie."

As early as the year 1557 different objects of the foundations had been distributed to different houses, viz., education to Christ's Hospital, the cure of sickness to St. Thomas's, and correction of malefactors to Bridewell. This appears from a minute of a general Court holden at Christ's Hospital on the 27th of September, 1557.

"And it is further ordered by this generall assemblye in consyderacon that as the good houses of Christ's hospitall hathe bene erected for the vertuouse bringinge vp of the myserable youth, and St. Thoms hospitall for the releuynge of the neadyne and deceased, and Bridewell for thenforeinge of the lewde and naughtie sorte to labo[r] and worke So for asmoche as the aforesaid Christ's and St. Thoms hospitalls have hetherto had no perfeccon that is to saye anye directe or plaine order for the maintenaunce of either of the said hospitalls That therfore one generall renter to be assigned shall yelde and paye vnto the Treasaurer of St. Thoms hospitall for the furniture of the charges of the same all the whole reuenewes and profects that shall come of the lands and rents in any wyse belonginge to the said hospitall vntill other or further order shalbe taken for the same And that the Scruteners and gatherers of Legacies shall make an Accompte of all their collecions at all suche tymes as they shalbe called vnto any generall courte And that the treasaurers and Scruteners of the said hospitalls shall receaue suche legacies and conteyne the same in their accomptes as from hensforth shalbe geven to anye of the said hospitalls And that no Treasaurer of any hospitall shall medle wth the legacie in any wise that is bequethed to another.

"And also that Christ's hospitall shall be stayed wth the

monethlye collecion graunted of the citizens and of suche yssues as shall aryse and growe of thoffice of Blackwell hall."

The distribution of functions and funds thus effected has never been disturbed. It does not appear that Christ's Hospital retained any of the property granted by the charter to the Corporation of London except the site of its buildings. The bulk of its endowments is derived from subsequent donations.

The arrangements made in 1557 with respect to the government of the hospitals gave rise to disputes between the City of London as governors of all the hospitals on the one hand, and the officers and acting governors of the several hospitals on the other; and in the year 1782 the Act 22 Geo. 3, c. 77, was passed for the purpose of giving validity to a settlement agreed on by the disputing parties. Thereby was established a separate governing body for Christ's Hospital, with full powers of management over its possessions and affairs. That is the body whose appeal comes first in the list, and raises the most important questions.

APPEAL A.

The main objection is one which strikes at the very root of the scheme, for it is contended that the emoluments which the Charity Commissioners have treated as educational endowments within the meaning of the Endowed Schools Act, 1869, are not really such, but are either excluded from the Endowed Schools Act, or, on the view most favourable to the interests of education, are endowments of a mixed character, such as are dealt with by the 24th section of the Act. This contention is supported on two grounds.

First, it is pointed out that the grant of Henry VIII. contemplates, not education specifically, but general eleemosynary objects; and that the grant of Edward VI., though it does contemplate education, does so only among other objects equally important. Therefore, it is argued that the first governors, the City of London, being entrusted with the application of these properties to various objects, might have applied the whole so as to exclude education; and so the endowments are, by the terms of sect. 8 (4) of the Endowed Schools Act, excluded from its operation.

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Their Lordships think that the answer to these arguments lies on the face of the instruments above cited. They do not agree that, under the grant of Edward VI., education could have been wholly neglected by the administrators of the funds. But passing by any question as to what the first governors might in their discretion have done, they did in fact take the reasonable and wise course of separating, as regards locality and property and management, the various public objects which they had to promote. This was done almost immediately after the foundation. Ever since that time the original site of Christ's Hospital and the large gifts made to it have been applied to education; and its governing body, acting separately from 1557 onwards, and placed separately upon an indubitably legal footing in 1782, has been concerned with educational funds. This long-continued application of these funds clearly brings them within sect. 5 of the Act.

But then it is said that a large portion (and calculations are made to shew that it is much the larger portion) of the funds has been expended on the physical sustenance of the boys admitted to the school; and it is argued that funds employed in maintenance or clothing are not within the Act unless according to the terms of sect. 29 they are endowments attached to a school for that purpose.

It appears to their Lordships that this argument attributes to sect. 29 an effect precisely the reverse of what was intended. If a donor has given property for no other purpose than that of maintenance or clothing, there might be a doubt whether it should be taken as a purely educational endowment under sect. 5, though it be attached to a school. Sect. 29 is adapted to remove this doubt, but not to cut down the definition of educational endowments given in sect. 5. It certainly would be a strange result if it were found that the Act treats endowments for maintenance of scholars as being general educational endowments if only they are attached to a school, and yet treats general educational endowments as being mixed, if in fact they have been applied in maintaining as well as teaching the scholars. Their Lordships think that no such anomaly is to be found in the Act. In their judgment funds are applied for the purposes of educa-

tion at school within the meaning of sect. 5, whether the system followed be that of teaching only, or that of taking in the scholars and maintaining as well as teaching them.

Their Lordships, therefore, are of opinion, with reference to the first objection of the Governors, that the scheme is right in treating all the general endowments of Christ's Hospital as educational within the meaning of sect. 5 of the Act, and in treating those which have been given to it for maintenance of scholars as educational under the terms of sect. 29.

Some objections have been made to the mode in which the Commissioners have dealt with recent endowments, or endowments given subsequently to the 2nd of August, 1819, which by sect. 14 (1) of the Act are excluded from the operation of schemes except with the assent of the governing body. Some of these objections were abandoned in the course of the argument, because it was found that the principles contended for by the appellants would not yield results more favourable to them than those adopted by the Commissioners. But Mr. Rigby still contended that where recent endowments had been spent in improving or maintaining the old property the amount spent should be ascertained and removed from the operation of the scheme.

To this contention their Lordships cannot assent. It may be that some gifts have been taken by the Governors and brought into the year's expenditure, part of which has been devoted to the maintenance of the hospital property. But the accounts to which their Lordships have been referred in the appendix do not shew, and there is nothing else in the record to shew, that the Governors have done anything except to apply in the maintenance of their property funds lawfully applicable for that purpose, as any other wise and prudent landowner might do. The accounts are not very clear upon this point, and probably were not made out with any such thought in the accountant's mind; but assuming that general legacies have been brought in to aid the year's income, and have not been funded or kept to any separate account, the result is that the money has been spent, and spent in legitimate ways: to trace such money would be impossible, and if possible, would be wrong.

Another important objection taken to the scheme rests on

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what are commonly called the conscience clauses of the Act, sects. 15 to 18. The scheme embodies them with a modification to be mentioned presently. The Governors contend that their foundation is one of those which, by force of sect. 19, are partially excepted from the provisions of the preceding sections, being, as they say, specially attached to the Established Church. Sect. 19 excepts any educational endowment the scholars educated by which are "required by the express terms of the original instrument of foundation, or of the statutes or regulations made by the founder or under his authority, in his lifetime or within fifty years after his death (which terms have been observed down to the commencement of this Act), to learn or to be instructed according to the doctrines or formularies of any particular church, sect, or denomination."

The instruments of foundation contain no directions on the subjects to be taught. To bring the case within sect. 19, the Governors rely first on an injunction issued by Edward VI. to all schoolmasters of youth, commanding them to teach in their schools the catechism of a certain godly and learned man—probably John Day; but this injunction, whatever its validity, is not a statute or regulation for Christ's Hospital, nor is Day's Catechism a formulary of the Church of England. The Governors next rely on a number of minutes entered in their books, and recording orders made by them from time to time. From these it appears that in the year 1570 the children were furnished with Dean Nowell's Catechism, that a person was appointed to give them instruction in "the Catechisme," and that attendance at the catechetical lessons was required of the officers of the house and of two governors. Nowell's Catechism never was a formulary of the Church of England. It is doubtful whether orders of the kind produced for appointing an officer, for providing books, for prescribing the places and times of instruction and the persons to attend thereat, are statutes or regulations of the kind contemplated by sect. 19. It is certain that we cannot find in them any such express terms for requiring instruction in the doctrines and formularies of the Church of England as are necessary to fulfil the requirements of that section.

But this part of the scheme (sect. 80) contains a provision

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which, so far as their Lordships know, is quite novel. It provides that when exemption from attendance on religious worship or teaching has been claimed for a scholar in the way prescribed by sect. 16 of the Act, every person in charge of a boarding-house of any school of the foundation shall allow such exemption. To this the Governors object, and their Lordships think that it is not warranted by the Act. In sect. 16 it is enacted that (when sect. 19 does not apply) "in every scheme . . . . the Commissioners shall provide that if the parent . . . . of any scholar who is about to attend such school, and who, but for this section, could only be admitted as a boarder, desires the exemption of such scholar . . . . but the persons in charge of the boarding-house of such school are not willing to allow such exemption, then it shall be the duty of the governing body of such school to make proper provisions for enabling the scholar to attend the school, and have such exemption as a day scholar." The Commissioners are here ordered to insert in their scheme the exact provisions of the section. If exemption is claimed for a boarder, and the persons in charge of the boarding-house are not willing to allow it, what is to be done? The Act says that provision shall be made "for enabling the scholar to attend the school, and have such exemption as a day scholar." The scheme says that the persons in charge of the boarding-house shall be bound to allow the exemption. These two directions are contradictory of one another, and in this respect their Lordships are of opinion that the scheme is erroneous.

APPEAL B.

The case of the Donation Governors is that at the passing of the Act of 1869 they were entitled to the right of presenting children for adoption into the hospital in rotation with other Governors; and that opportunities for presentation occurred, on an average, every three and a half years. Sect. 93 of the scheme materially curtails this privilege, for it provides that a Donation Governor shall not present a child as long as there is on the foundation any child presented by him; and also that one-third of the presentees shall be girls. The Donation Governors, therefore, object that the scheme is not in conformity

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with the Act because it has not had regard to their patronage as directed by sect. 13.

Their Lordships agree with the appellants that they are persons directly affected by the scheme, and are therefore entitled to be heard on the question whether the scheme is or is not in conformity with the Act, sect. 39 (3); but on that question the decision must be against the appeal. It is impossible to deny that regard, and substantial regard, to the patronage in question has been paid in framing the scheme. The appellants contend that it is not sufficient regard; but they have not in their case, or through their counsel, suggested any measure of the regard that should be paid, except that the patronage should be left wholly untouched, or that a full equivalent should be given in exchange for it.

Their Lordships cannot put such a construction on the Act. Sect. 11 enacts, that when a scheme abolishes or modifies the educational advantages of any class of persons, the Commissioners shall have due regard to the educational interests of that class; and sect. 39 is careful to provide an appeal to Her Majesty in Council by the governing body on that very point. Sect. 13 first enacts that the Commissioners shall save or make due compensation for certain vested interests; and sect. 39 expressly provides an appeal on that very point by the persons directly affected. Those vested interests do not include the rights of patronage claimed by the Donation Governors. They are dealt with by a separate sentence in sect. 13, which directs the Commissioners to have regard to them, and no express mention of them is made in sect. 39. If the legislature intended what the Donation Governors allege, rights of patronage should simply have been set down in sect. 13 as one of the vested interests to be saved or duly compensated. But they are dealt with in different terms, and are clearly placed on a different footing both from vested interests and from those educational interests to which due regard is to be had. Their Lordships hold that this scheme, which pays regard, not illusory but substantial, to the rights of patronage in question, cannot be successfully impeached as not being in conformity with the Act in that respect.

APPEAL C.

The position of the appellants in this case is a little complicated. They are a portion of the governing body established by the Act of 1782. They represent especially the Corporation of the City of London, which was the original grantee of the endowments of Henry VIII. and Edward VI., and, as their Lordships understand, is still legally seised of the estates of the hospital, though without any powers of management. The city has made gifts to the hospital, and there have been accorded to the Governors who specially represent it certain privileges of presenting children who are received upon the foundation. They now complain of the scheme because it has not due regard to their rights of patronage. But they also assume the position of a governing body, and take objections to the scheme of the same character as have been dealt with in Appeal A, and the additional objection that the scheme has not due regard to the educational interests of the destitute poor of certain localities.

So far as regards rights of patronage, the case stands on the same footing as the case of the appellants in Appeal B, and the appeal must be rejected for the reasons there assigned.

As regards the other objections, their Lordships consider that the appellants are not in those matters directly affected by the scheme, and are not the governing body to which by sect. 39 the right of appeal in such matters is confined. It is true that the expression "governing body" is by sect. 7 of the Act defined in wide terms, which, though not strictly grammatical, may include persons who have the right of holding any endowment dealt with by the scheme. And it may be that in some foundations there are more bodies than one who for different purposes of the Act have to be considered as governing bodies. But no such question arises now. In sect. 7 the meaning given to the term governing body is expressly stated to be "unless the context otherwise requires;" and by sect. 39 the governing body, which is invested with the important power of appealing on several grounds of general interest to the objects of the foundation, must be that body alone which is charged with the power and the duty of general management. These appellants, therefore,

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have no locus standi to be heard on appeal, except as regards their rights of patronage.

APPEAL D.

The appeal of Guy's Hospital has relation to a gift made in the year 1724 by Thomas Guy, the founder of that hospital, to Christ's Hospital. By that gift the funds of Guy's Hospital were charged with the payment of £400 a year to Christ's Hospital upon condition that Guy's Hospital should have liberty to put into Christ's Hospital every year four poor children, with a preference to founder's kin.

From that time to the present the annual payment of £400 has been made, and every year four children of Guy's family have been appointed to Christ's Hospital by Guy's Hospital. In the year 1830 Christ's Hospital, finding that the charge of maintaining and teaching Guy's children exceeded the value of the annuity, endeavoured to renounce it, but was compelled to continue it by a decree of the Court of Chancery.

The annuity has been carried into and administered as part of the ordinary income of Christ's Hospital, and as such is operated on by the scheme. Guy's Hospital now complains of certain clauses of the scheme, viz., of sect. 85, which restricts the benefits of the foundation to such as stand in need of assistance, and requires contributions of those whose parents are able to contribute substantially; of sect. 86, which imposes certain conditions as to the character and health of the children; and more especially of sect. 99, by which only eight places on the foundation are reserved for Guy's family, and those only for the period of twenty years from the date of the scheme. Guy's Hospital claims to be a governing body of Christ's Hospital, so far as regards the endowment in question, and therefore to have the right of appealing under sect. 39 (4) of the Endowed Schools Act on behalf of Guy's family.

The claim to be a governing body within the meaning of sect. 39 of the Act is inconsistent with the construction above placed on that section. Guy's Hospital is under an obligation to pay £400 a year to Christ's Hospital, upon the conditions of Guy's will. But the Governors of Christ's Hospital are the

general managers of that sum, as of the other revenues of their hospital. What remedy Guy's Hospital may have against a breach of the conditions of Guy's will by Christ's Hospital is a question of law which can only be decided in a suit properly constituted for the purpose. For the purpose of this appeal Guy's Hospital can only be considered as a body corporate directly affected by the scheme, and objecting to it as not being in conformity with the Act because it does not pay regard to the rights of patronage. So far as that consideration goes their Lordships think that this case does not substantially differ from that of the Donation Governors, and that the objection to the scheme cannot be sustained. As regards the educational interests of Guy's children, Guy's Hospital have no locus standi under sect. 39. The right of appeal on this point is given to the Governors of Christ's Hospital alone.

APPEAL E.

The appeal of the Fishmongers' Company relates to a gift made by Mark Quested in the year 1642, and to a compromise between the company and Christ's Hospital in the year 1683. Under the compromise the company paid to Christ's Hospital the sum of £200, and Christ's Hospital became bound to receive forthwith six poor children on the appointment of the company. It was also arranged that the company should be entitled to have six nominees always in Christ's Hospital, paying the sum of £4 3*s.* 4*d.* a year for each. This arrangement has continued up to the present time. The company object to the scheme on the ground that it does not pay proper regard to the rights of the company or to the educational interests of their nominees.

Probably the considerations which would govern this appeal on its merits are substantially the same as apply to Appeal D. But their Lordships are precluded from entering into such considerations, because the 42nd section of the Endowed Schools Act forbids appeals having relation only to endowments which during the three years preceding the commencement of the Act have had an average annual gross income of not more than £100.

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AS TO ALL THE APPEALS.

The general result is, that in their Lordships' opinion all the petitions of appeal should be dismissed except the petition of the Governors of Christ's Hospital. Upon that petition their Lordships think that the proper course will be to remit the scheme to the Charity Commissioners, with a declaration that it is erroneous so far as it fails to embody the provisions required by sect. 16 of the Endowed Schools Act, 1869, and so far as it requires persons in charge of a boarding-house to allow exemptions from prayers and religious worship.

They will humbly advise Her Majesty accordingly.

Solicitor for the Governors and Donation Governors of Christ's Hospital: *R. M. Beachcroft.*

Solicitor for the Mayor, &c., of London: *The City Solicitor.*

Solicitors for Guy's Hospital: *Winter & Co.*

Solicitor for the Fishmongers' Company: *C. D. Humphreys.*

Solicitor for the respondents: *Farrer & Co.*

[PRIVY COUNCIL.]

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BOOTH AND OTHERS. . . . . DEFENDANTS;

AND

RATTÉ. . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Rights of Riparian Owner—Navigable River—Damages.

Held, that a riparian owner is at liberty to construct and moor to his bank a floating wharf and boathouse, the same not being an obstruction to the navigation, and is entitled to maintain an action for damages in respect thereof caused by any unauthorized interference with the flow and purity of the stream.

APPEAL from a decree of the Court of Appeal (June 29, 1887), affirming a decree of the Divisional Court (March 6, 1886),

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

which reversed a decree of Proudfoot, J. (Nov. 11, 1885). The facts are stated in the judgment of their Lordships.

Proudfoot, J., held that by the Crown grant Aumond took the soil of the river for two chains subject to the rights of navigation in the public; that that soil was conveyed to Prevost but was not conveyed by Prevost to the respondent; and that as the Ottawa was a navigable river the respondent did not acquire any right for his wharf or boathouse by occupation.

The Divisional Court (see 11 Ontario Reports, p. 491), reversed this decision.

In the Court of Appeal Hagarty, C.J., and the majority of the judges held that the respondent being in possession could maintain this action against wrongdoers. Burton, J., held that the respondent was not a riparian proprietor, and that, being a trespasser as regards his wharf and boathouse, he could not maintain this action against the appellants.

Bompas, Q.C., and *Gore*, for the appellants, contended that the respondent had not made out his title either to access to the river or to the exercise of riparian rights as respects any part of the property of which he was in possession. The respondent's property is shewn to be separated from the river by a strip of land belonging to another owner. Then as regards the wharf and boathouse he was a mere trespasser. At any rate he had no title to either or to the site thereof such as to enable him to bring this action. He had no rights in reference to the boathouse or wharf with which the appellants had interfered. By the patent of the 24th of December, 1850 (and see 23 Vict. c. 2, s. 35, as incorporated in the Revised Statutes of Ontario, c. 23, s. 47), the rights of navigation are reserved to the Crown. The wharf and boathouse constitute an obstruction to such right. The damage done to the respondent's property, other than the boathouse and wharf, are nil. Reference was made to *Micklethwait* v. *Newlay Bridge Company* (1); *Child* v. *Starr* (2); *Stockport Waterworks Company* v. *Potter* (3); *Attorney-General* v. *Terry* (4).

Jeune, Q.C., and *Rubie*, for the respondent, were not heard.

(1) 33 Ch. D. 133.
(2) 4 Hills (New York Rep.) 369.
(3) 3 H. & C. 300.
(4) Law Rep. 9 Ch. Ap. 423.

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1890. Feb. 1. The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The suit to which this appeal relates was brought by the respondent in the Chancery Division of the High Court of Justice of the Province of Ontario against the appellants, who are severally owners of saw mills in the city of Ottawa, on the Ottawa river. It was first heard by one judge, who dismissed the suit. On an appeal to the Divisional Court that Court set aside his judgment and gave judgment for the plaintiff, and ordered that it be referred to one of the masters of the Court to inquire and state the amount of the damages the plaintiff had sustained, and the amount of such damages for which the defendants were respectively liable. The defendants appealed to the Court of Appeal for Ontario, which Court dismissed their appeal, and they have appealed to Her Majesty in Council.

The plaintiff has a floating wharf and boathouse on the Ottawa river, about half a mile below the saw mills of the defendants. The wrongful acts complained of are thus described in the judgment of the Chancellor of the Divisional Court: "The evidence very clearly establishes that the defendants are wrongdoers, who from their mills allow sawdust, blocks, chips, bark, and other refuse to fall into the River Ottawa, and thereby pollute the water and impede navigation. This refuse accumulates in great floating masses, substantial enough occasionally for a man to walk upon, and the tendency of the currents and the prevalent direction of the winds bring these masses in front of the plaintiff's property up to his boathouse and wharf and the banks of his lot. Depositions of sawdust are thus by degrees formed before his property, and they result not only in fouling the water, making it offensive both to taste and smell, but produce from the gas generated underneath the surface frequent explosions, which are disagreeable and sometimes dangerous. It is thus proved that the plaintiff sustains special injury beyond the rest of the public by this unauthorized interference of the defendants with the flow and purity of the stream. He is injured in the personal enjoyment of the property and the river, and he is injured in the business which he follows of hiring and housing

pleasure boats." No evidence was given for the defendants. The defence they relied upon was that the plaintiff had no title to maintain the action.

The root of the plaintiff's title is a grant from the Crown under the Great Seal of the Province of Canada, dated the 24th of December, 1850, to Joseph Aumond, of a piece of land in the town of Bytown, by the following description: "Being composed of water lot number one in letter O in the aforesaid town of Bytown, being butted and bounded as follows, that is to say, commencing where a stone monument has been planted on the west side of Metcalfe Street, at the south-east angle of the said water lot; then north 23° 30′ west three chains more or less to where a monument has been planted on the north-east angle of the said water lot south 66° 30′ west four chains ten links more or less to a point in the Ottawa river two chains' distance from the shore; then southerly parallel to the general course of the shore to a point in the northern limit of Cathcart Street produced on a course of south 66° 30′ west distant two chains from the aforesaid shore of the river Ottawa; then north 66° 30′ east six chains ninety-six links more or less to the place of beginning." The power of the Crown to grant water lots in harbours and navigable rivers, subject to the public right of navigation, in Upper Canada, was declared by the Act 23 Vict. c. 2, s. 35, Canada Statutes. Aumond appears to have sold portions of the water lot to different persons, and by a deed dated the 2nd of November, 1866, he sold and conveyed to Amable Prevost, amongst other lands, water lot number one, more particularly described in the deed from the Crown, excepting certain portions of the lot sold and conveyed by several conveyances to other persons who are named. By a deed dated the 23rd of July, 1867, Prevost sold and conveyed to the plaintiff part of the water lot granted by the Crown to Aumond, by the following description of the boundary towards the river, "thence along the northerly line of Cathcart Street in a westerly direction to the water's edge of the river Ottawa, thence along the said water's edge down the stream in a northerly direction to the line of Bolton Street." It will be observed that here the boundary on the river side is called the water's edge, whilst in the Crown

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grant the boundary of the land granted is two chains from the shore, and the contention of the defendants at the original hearing and in the appeals was that the plaintiff was not entitled to the two chains.

Before the conveyance to the plaintiff was executed he was put in possession, by Prevost, of the subjects which were to be conveyed to him, and constructed a floating wharf and boathouse, in size 60 feet along shore and 16 feet wide, and moored it to the bank of the river. In 1874, or about that time, he increased the size of the wharf and boathouse to 140 feet in length, by 40 feet in width. It draws 4 or 4½ feet of water, and floats chained at each end. There is no evidence as to the depth of the water at the side or in front of it. The plaintiff has from the time when the wharf and boathouse were first placed there occupied it without any question or objection by either the Crown or Prevost, and by means of it has been doing a very considerable business as a letter of boats, &c.

This is not a case of a stranger taking possession of part of the two chains. The plaintiff moored the wharf to the bank where he thought fit, by virtue of his purchase, and had possession. The expression "along the water's edge" may either signify the line which separates the land from the water, or a water space of greater or less width constituting the margin of the river. The description in the conveyance is capable of being explained by possession, and it appears to their Lordships that the possession which, in this case, has followed upon the conveyance is sufficient to give the plaintiff a good primâ facie title to the whole of the two chains as against Prevost. Even if he had not such a title, and occupied only by the permission of Prevost, that would be sufficient to entitle him to maintain the action. No question arises in this case as to the wharf and boathouse being an obstruction to the navigation, but it may be noticed that the Chancellor in his judgment in the Divisional Court says: "Here all the tendency of the evidence as to the position of the plaintiff's bank, the bay there formed at a distance of 700 feet from the main channel, the great width of the Ottawa, its ample facilities for shipping apart from the comparatively narrow strip where the plaintiff's wharf is moored, the fact

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that the plaintiff has thus occupied the property in question for over twenty years, all strongly suggest that he has done nothing detrimental to river and navigation, but that on the contrary his wharf has been a benefit to the boating public." So far from being an obstruction to navigation, the maintenance of a floating wharf of that kind is, in the circumstances stated by the learned Chancellor, a positive convenience to those members of the public who navigate the river with small craft. As a riparian owner the plaintiff would be at liberty to construct such a wharf, and would be entitled to maintain an action for the injuries to it which are complained of.

For these reasons their Lordships agree with the Divisional Court and the Court of Appeal that judgment should be given for the plaintiff, and they will humbly advise Her Majesty to affirm the judgment of the Court of Appeal and dismiss this appeal. The costs will be paid by the appellants.

Solicitors for appellants: *Bompas, Bischoff, Dodgson & Coxe.*
Solicitors for respondent: *Pritchard & Sons.*

[PRIVY COUNCIL.]

J. C.* 1890 Jan 28.

PHILLIPS . . . . . APPLICANT;

AND

MARTIN . . . . . CAVEATOR.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Application to Set Aside—Verdict of Jury.

A verdict of a jury will not be disturbed as against evidence or the weight of evidence, unless it is one which a jury, viewing the whole of the evidence reasonably, could not properly find.

APPEAL from an order of the Supreme Court (March 23, 1888) dismissing an application for a rule nisi.

The nature and grounds of the application are stated in the judgment of their Lordships.

* *Present:*—LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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Sir *Horace Davey*, Q.C., *Wylie* (of the New South Wales bar), and *Leverson*, for the appellant.

The respondent did not appear.

The judgment of their Lordships was delivered by LORD MACNAGHTEN:—

This is an appeal from a judgment of the Supreme Court of New South Wales, dismissing the appellant's application for a rule nisi for a new trial of certain issues directed to be tried in the matter of an application by the appellant to bring certain lands under the Real Property Act, and in the matter of a caveat lodged by the respondent. The issues were these—(1.) Did Caroline Martin sign a disentailing assurance, dated the 22nd of January, 1875? (2.) Did Caroline Martin sign a deed of conveyance of the 1st of June, 1875? On both these issues the jury found in the negative. No objection has been taken to the summing-up of the learned judge on the ground of misdirection, and the learned judge has expressed himself as entirely satisfied with the verdict—a matter not lightly to be disregarded.

The appellant contends that the verdict was against the evidence, or against the weight of the evidence. It is settled that a verdict ought not to be disturbed on that ground unless, to use the words of Lord Herschell in the *Metropolitan Railway Company* v. *Wright* (1), "it was one which a jury, viewing the whole of the evidence reasonably, could not properly find."

Now, as regards the first deed, their Lordships think that the jury might properly find that that deed was not signed by Caroline Martin. She swore positively that she never signed it. Wright, who was brought forward as a witness to her signature, gave his evidence, according to the learned judge who tried the case, in an unsatisfactory way, and was not credited by the jury; and the scrawl which is said to be her signature bears no resemblance to her admitted signatures, and very slight resemblance to the words which form her name.

Having come to this conclusion, and finding that Mrs. Martin admittedly got nothing for parting with her life interest, if

(1) 11 App. Cas. 152.

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indeed she did part with it, the jury might not unreasonably come to the conclusion that her alleged signature to the deed of conveyance was not written by her, although there is no imputation on Mr. Charlton, and although the signature to the deed of the 1st of June, 1875, bears a close and singular resemblance to her admitted signatures.

The question was one pre-eminently for the jury to decide. They saw the witnesses, and they had before them the original signatures on the deeds and on the caveat. Their Lordships think that, on the whole, there is no ground for disturbing the verdict; and they will therefore humbly advise her Majesty that the appeal ought to be dismissed.

Solicitor for appellant: *R. C. Want.*

[PRIVY COUNCIL.]

J. C.* 1890 Feb 6, 22.

MANNING . . . . . APPELLANT;

AND

THE COMMISSIONER OF TITLES . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Law of Western Australia—Transfer of Land Act, 1874, *ss.* 19, 21, 120—*Absence of Caveat—Power of Commissioner to refuse Registration.*

Held, that according to the true construction of sections 19 and 21 of the Transfer of Land Act, 1874, the commissioner is not bound to register title merely by reason of the issue of the prescribed notices and the non-appearance of a caveat. Such notices may produce information, and the commissioner, in consequence thereof or of reconsideration, has a discretion to refuse to register, subject to the opinion of the Supreme Court under sect. 120.

APPEAL from a judgment of the Supreme Court (Dec. 16, 1887), on a case stated by the respondent under sect. 12 of the Transfer of Land Act, 1874, for the opinion of the Supreme Court.

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR BARNES PEACOCK.

J. C. 1890

MANNING v COMMISSIONER OF TITLES.

The facts, the special case, and the material sections of the Act are stated in the judgment of their Lordships.

The question for decision in the appeal was, whether the respondent has power under the Act of 1874, after he has intimated to an applicant for registration under that Act that his title is fairly made out, and after the advertisements required by the Act have been issued, and when no caveat forbidding registration has been lodged, to reject the application and refuse registration.

The Acting Chief Justice decided that he could; Stone, J., that he could not. The judgment was in accordance with the opinion of the former.

That opinion was, so far as is material, that if the application of the appellant to be registered as the owner should be conceded, it must be conceded on a very rigid and, indeed, strained construction of sect. 12; that to place the Court in a position to do justice between all parties every particle of documentary evidence in possession of the respondent or the appellant should be produced to the Court, and that the case should be stated not merely under sect. 12, but under sect. 120; that if the appellant's application were bonâ fide, documentary evidence would be produced to support it; if it were malâ fide, then so much the greater would be the necessity for such production, and the injury done to the real owner by admitting the appellant's claim would be all the more deplorable if the Supreme Court should allow itself to be the instrument of such injury; that the facts, real or supposed, which had induced the respondent to stay his hand in issuing the certificate of title, would be available in his hands for the cancellation of the certificate the moment after it had issued, and should, therefore, be available for the same purpose before it had issued—that the Act was a weapon of defence, not offence, and must not by an adherence to the words and rejection of its substance be used to deprive a proprietor of his rights, and that the appellant had not made out his case.

Stone, J., on other hand, was of opinion that the respondent had done all he was required to do; that the statute gave him no power to rescind his direction and reject a title after having once approved of it; that the 19th and 21st sections of the Act

were imperative on the registrar to register, unless a caveat was lodged; that it was of the utmost importance, as the statute then stood, that the commissioner should not give directions for the notices to be advertised until he had perfectly satisfied himself as to the state of the applicant's title; that after such action he had, in fact, judicially decided in favour of the title, and could not recall that decision except upon the ground that it was obtained by fraud, and he was inclined to doubt whether, even upon that ground, he could alter his decision.

Rowlands, Q.C., and *Cowell*, for the appellant, contended that the commissioner's power to reject an application and refuse registration can only be exercised in the first instance. After he has ruled that the applicant's title is primâ facie a good one, and has directed the publication of notices, an adverse decision upon the applicant's title can only be come to by the Court on a contestation duly raised by a caveator entering an opposition as a responsible litigant. Failing a caveat, the order, which originally has the effect of an order nisi, becomes an absolute order, which can only be set aside on a sufficient case being made to the satisfaction of the Court. The case was brought on by consent under sect. 12, and raised the question of the power of the commissioner to act as stated in the special case. The Act was examined to shew that it was the intention of the legislature that, as soon as a primâ facie case of title by adverse possession was made out, the procedure prescribed for disputing it was by litigation in open Court, founded on a caveat or direct application, under which the Court could exercise its jurisdiction, and hear and determine the question as a matter in litigation before it. The commissioner could not, by entertaining applications and listening to information or evidence behind the back of the original applicant, make an order in prejudice of his primâ facie title, on the faith of which he had incurred the expense of publication and other costs imposed by the Act.

Rigby, Q.C., and *J. B. Wood*, for the respondent, contended that he had never finally declared his approval of the appellant's title. There was nothing in the Act to require him finally to

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approve the title before directing advertisements and notices to be published. Such publication is no evidence of the title having been approved. There was nothing in the Act to deprive the commissioner of the power and duty given or implied by the Act to make investigation at any time before final order of registration. The provision in the Act for the lodging of a caveat by the registrar is directory only. It is mere machinery, and does not prevent the commissioner from otherwise forbidding the registration of a title not established to his satisfaction. The appellant had not made out his title to the satisfaction of the respondent, and no information was given by the special case as to what his title was. Accordingly, he had not made out his claim to be registered under the Act.

Rowlands, Q.C., replied.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The appellant claims that her predecessor in title, L. A. Manning, was in a position which entitled him to call upon the respondent to register his title under the Transfer of Land Act, 1874. The respondent denies that, and on a special case stated by him under sect. 12 of the Act for the opinion of the Supreme Court, judgment has been given in his favour. The Court, consisting of two judges, was divided in opinion, and the judgment is in accordance with the opinion of the Chief Justice.

The question turns on the construction of the 19th and 21st sections of the Act, which it will be convenient here to set out:—

"19. If it shall appear to the commissioner that any such transaction as aforesaid has been registered, and that all encumbrances affecting the land (excepting such as are hereinafter mentioned as not requiring special notification) have been released, or that the owners thereof have consented to the application, or that any encumbrance (not being a mortgage, the owners whereof shall not have consented to the application) may be specified in the certificate of title, and continue outstanding, the commissioner shall direct notice of the application to be

advertised once at least, in one newspaper published in the city of Perth, or circulating in the neighbourhood of the land, and to be served on any persons named by him, and shall appoint a time, not less than fourteen days, nor more than twelve months from such notice, or from the advertisement, or the first of such advertisements, if more than one, on or after the expiration of which the registrar shall, unless a caveat shall be served forbidding the same, bring the land under the operation of this Act.

"21. If before the expiration of the time limited in the notice aforesaid for lodging a caveat the registrar shall not have received a caveat forbidding the bringing of the land in question under the operation of the Act, he shall bring such land under this Act by registering in the name of the applicant, or in the name of such person as may have been directed in that behalf, a certificate of title to such land in the form in the second schedule hereto."

The material facts are as follows:—Manning having applied on the 25th of July, 1887, to be registered as the proprietor of a certain location by virtue of possession, the commissioner made requisitions on his title which were answered by his solicitors. On the 8th of August the commissioner stated that he considered the title fairly made out, and that he should advertise. He advertised according to sect. 19, and fixed the 29th of October as the last day for entering caveats. No caveat was entered; but, in the language of the special case, "on the 24th of October the commissioner forwarded to the solicitors for the applicant a declaration and certain depositions on oath which he had taken without notice to the applicant, and which tended to throw doubt on the applicant's possession."

On the 28th of October the commissioner formally notified to the solicitors that the application was rejected.

The course then taken by the solicitors and the commissioner is thus stated in the special case:—

"7. The applicant's solicitors consider the rejection is beyond the power of the commissioner, and contend that the commissioner having once expressed himself satisfied with the title as proved by the applicant, and having advertised under sects. 19 and 20 of

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the Act, and no caveat having been entered, his power to reject has gone, and it is imperative upon the registrar, under sect. 21 and the general scope of the Act, to bring the land under the Act by registering the same in the name of the applicant.

"8. A formal application to the registrar to perform his duty in this respect has been made, but he, relying upon the fact 'that the application had been rejected by the commissioner, who was not prepared to sign a certificate of title,' refused to register."

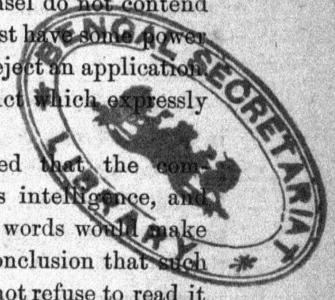
Upon these facts the commissioner stated the special case, in which Manning's solicitors concurred, and which was heard with the result above mentioned. Nothing was stated to shew the nature of Manning's title except that it rested on possession, or the nature of the evidence against it except that it brought the allegation of possession into doubt. The next question raised by the case, and argued in the Supreme Court and here, is whether on the 8th of August, 1887, the commissioner and the registrar became mere machines for registration in case no caveat should be lodged.

It must be admitted that the strict literal construction of the sections above set forth is in favour of the appellant's view. But the whole purview of the Act must be looked at. We find that the commissioner is to be a lawyer of seven years' standing and practice, and that, amongst other things, he is to investigate applications for bringing land under the provisions of the Act. And it is very important to see what is the language of the Act with regard to the applications which the commissioner is expected to investigate.

Sect. 17 says that land alienated in fee by the Crown before the Act may be brought under the operation of the Act by an application made by, among other persons, the person claiming to be owner of the fee simple either at law or in equity. Sect. 18 says that the registrar shall submit the application to the commissioner for his direction. Then sects. 18 & 19 go on to deal with properties which are found differently circumstanced.

If the commissioner finds that no transaction affecting the land has been registered under any general Act, sect. 18 says that "he *shall* direct the registrar to bring the land under the

operation of this Act by registering a certificate of title." According to the literal force of sects. 17 and 18, any person may appear claiming to be the owner of land alienated in fee by the Crown, and if there has been no previous registration the commissioner has absolutely nothing to do but to direct the registrar to enter a certificate of title. It is felt by all that such a conclusion is irrational, and the appellant's counsel do not contend for it. They admit that the commissioner must have some power of inquiry, and some discretion to accept or reject an application. But they cannot point to any words of the Act which expressly confer those powers upon him.



As regards sect. 18, then, it is not disputed that the commissioner is an official bound to exercise his intelligence, and not a mere machine, as the literal force of the words would make him. Now, when we have once reached the conclusion that such a meaning must be read into sect. 18, we cannot refuse to read it into sect. 19, and then it is for those who insist on his mechanical action to shew at what point his discretion ceases and his obligation to follow a rigid rule begins.

It is not contended that the Act anywhere defines this point, or that it orders the commissioner to sign a certificate of title except so far as such an order may be implied by the direction to the registrar in sect. 21. The appellant's counsel contend that in a case falling within sect. 19 the discretion of the commissioner is at an end when he has decided to advertise and serve notices. By that time, they argue, he must be taken to have completed his investigations, and, in fact, in this case he did intimate to the applicant's solicitors that the title had been fairly made out. But it appears to their Lordships that the investigations cannot be complete until it is seen what the notices produce. They may not necessarily produce caveats, for those can only be lodged by persons making claims on their own behalf, but they may produce information shewing that registration of the applicant would not be right. If a certificate of title is issued in error, the commissioner may, under sect. 117, take steps to cancel it. Supposing, then, that before certificate, the commissioner finds, either from fresh information or on reconsideration, that he is in error, what is he to do? The

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appellant's counsel contend that, if he has issued notices and there is no caveat, he must give the certificate and then take steps to cancel it. It seems to their Lordships that such a course is not rational and is not obligatory under the Act, but that the proper course in such a case is to refuse the certificate.

The applicant is not without remedy in such a case. If the commissioner exercises his discretion wrongfully or erroneously, the applicant may, under sect. 120, first require him to set forth his reasons, and then summon him before the Supreme Court to maintain his case. In that proceeding the whole substance of the case may be thoroughly examined. Here the applicant has not chosen to take that course, but has preferred to insist that the commissioner is bound, by the issue of notices on the 8th of October, and by the non-appearance of any caveat, to register the claim of title. As the applicant fails in that contention, this appeal must be dismissed, and with costs.

Their Lordships will humbly advise Her Majesty in accordance with this opinion.

Solicitor for appellant: *W. H. Herbert.*
Solicitors for respondent: *Sutton & Omnaney.*

[HOUSE OF LORDS.]

STORER & CO. . . . . APPELLANTS;

AND

JOHNSON AND WEATHERALL . . . . RESPONDENTS.

H L (E)
1890
March 27.

Solicitor—Costs—Taxation—Country Solicitor and London Agent—Bill of Agency Charges—Taxation of Part of Bill—Solicitors Act 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

The Court has no power, under sect. 37 of the Solicitors Act 1843 (6 & 7 Vict. c. 73), to direct taxation of a part only of a solicitor's bill of costs, but the Court has such a power by virtue of its inherent jurisdiction and apart from statute

Taxation of part of an agency bill of costs may be directed upon the terms of payment into Court by the applicants of the whole amount claimed to be due by the agents

The decision of the Court of Appeal (37 Ch. D. 433) affirmed with a variation.

APPEAL from a decision of the Court of Appeal reported as *In re Johnson and Weatherall* (1)

The respondents, London solicitors, acted for years as the London agents for the appellants, solicitors in Manchester. A bill of agency charges delivered by the respondents to the appellants on the 3rd of January 1886 contained many items relating to separate and independent suits or matters, and among them charges amounting to £1239 1s. 4*d.* in respect of the suit *Mellor* v. *Swire.*

In January 1887 the appellants took out a summons (2) to tax "the bill of fees, charges and disbursements delivered on the 3rd day of January 1886 in *Mellor* v. *Swire.*"

North J. declined to make an order. The Court of Appeal (Cotton, Lindley and Bowen L.JJ.) thought that taxation of so much of the bill as related to *Mellor* v. *Swire* should be directed on the terms of the appellants paying to the respondents within ten days the cash balance claimed to be due, subject to an undertaking to refund if necessary. The appellants having declined

(1) 37 Ch. D. 433.

(2) The terms of the summons are given in the report, 37 Ch. D. 433.

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the terms offered by the Court of Appeal, the Court affirmed the order of North J. with costs.

The cash balance named in the terms was £1188 1*s.* 4*d.*; it now appeared that the cash balance claimed to be due at the time of the hearing before the Court of Appeal was less than that sum, and that the balance claimed to be due at the hearing of the present appeal was £746 3*s.* 9*d.*

March 27. Sir *Horace Davey* Q.C. and *E. L. Levett* for the appellants:—

The appellants desire to tax only the charges relating to *Mellor* v. *Swire*, which is really one bill out of many, the other matters having no connexion with *Mellor* v. *Swire*. If these charges form a separate bill no one doubts that there is jurisdiction to tax under the Solicitors Act 1843. But assuming that they do not form a separate bill, there is jurisdiction to tax part of a bill either under the Act or under the inherent jurisdiction of the Court in a proper case. If under the Act, it would perhaps not be right that the respondents should pay the costs of the taxation if a sum were taxed off which was more than one-sixth of the charges complained of, but less than one-sixth of the whole charges. But the Court has power to do justice in the matter of costs. If under the inherent jurisdiction of the Court, the Court has a discretion, but it is a judicial discretion subject to review, and the present case is one in which an unconditional order to tax ought to have been made. The Court had no power to impose such terms as were offered, terms relating to matters other than *Mellor* v. *Swire*; or if it had the power they were not such terms as ought to have been made.

Cozens-Hardy Q.C. and *Ingle Joyce* for the respondents:—

The summons to tax was taken out under the statute, for it refers to it; and an order to tax under the statute involves all the statutory consequences, as to costs and otherwise: *Smith* v. *Edwards* (1). Under the Act there is no power to tax part of a bill. Independently of the Act the Court has power to order taxation of part of a bill, but it has long been the settled practice

(1) 22 Q. B. D. 10.

not to order taxation of an agency bill, or part of it, except upon payment of the whole amount into Court: *Ostle* v. *Christian* (1); *Jones* v. *Roberts* (2); *Lees* v. *Nuttall* (3); Tidd's Practice, 9th ed. 1828, p. 332; Merrifield's Law of Attornies, p. 226. The respondents have no objection to the taxation asked for provided the amount of the balance claimed by the last cash account, £746 3*s.* 9*d.*, be paid into Court.

Sir *H. Davey* in reply:—

This is not a summons to tax under the Solicitors Act; even if it were the Court has power to treat it independently of the Act.

It now appears that the balance claimed before the Court of Appeal, £1188 1*s.* 4*d.*, was wrongly claimed upon the respondents' own shewing; the appellants were not bound to accept such terms. The authorities are said to establish the rule that the whole amount of the bill to be taxed must be paid into Court as a condition of allowing the taxation. But the whole amount of the charges to be taxed is £1239 1*s.* 4*d.* The amount claimed before the Court of Appeal and the amount now claimed are each less than the amount of the charges to be taxed; and they are made up of items not in any way connected with the charges to be taxed. The £1239 1*s.* 4*d.* claimed in *Mellor* v. *Swire* has been long since paid by the respondents' appropriation of payments on account, as shewn by the last cash account furnished by them. Nothing therefore ought to be paid into Court.

LORD HALSBURY L.C.:—

My Lords, it seems to me that there has been a considerable error about this case throughout. The summons, I cannot entertain any doubt, was intended to be taken out under the Solicitors Act. The reference to that portion of the Solicitors Act which makes the costs dependent upon the proportion which is taxed off convinces me, apart from the argument in the Court below, that the parties intended to insist upon their right to have this part of the costs severed from the rest and to have that taxed by

(1) Turn. & R. 324. (2) 8 Sim. 397.
(3) 2 My. & K. 284.

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itself. My Lords, I am of opinion that that course is erroneous; and I believe that your Lordships are all of opinion that in a proceeding under the Solicitors Act we cannot do what is asked to be done by the appellants. But it was of course open to the Court to pronounce a judgment which should do justice between the parties when once the case was brought before them. This was not a case in which the summons absolutely bound the Court as to the remedy which they should administer; and I think it is quite clear that the Solicitors Act did not deprive the Court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers, and that they might therefore order that the costs should be taxed, although not in terms of the Solicitors Act, and they might have selected one particular portion of the bill of costs to be taxed. The moment it was taken out of the region of the Solicitors Act and brought within the general jurisdiction of the Court, then the Court could exercise its own jurisdiction in the way it might think fit; and I am of opinion that the Court rightly exercised its jurisdiction so far as it was advised of what were the real facts. On the other hand I agree that it was unreasonable, in the then state of the account between the parties, to insist upon the whole amount, £1188 1*s.* 4*d.*, being either paid into Court or paid to Messrs. Johnson & Weatherall. If as a matter of fact the truth was that there was at that time only £1000 due (although only £746 is due now), it would have been unreasonable to insist that more should be paid than was either due or claimed by the parties.

I am therefore, my Lords, of opinion, and move your Lordships, that the order of the Court of Appeal should be varied to this extent, that upon payment into Court of £746 3*s.* 9*d.* the order sought for to tax these particular items as distinguished from the rest of the bill should be permitted, and that that should be done within the time limited by the Court of Appeal, and that otherwise the appeal should be dismissed with costs.

Then, my Lords, having arrived at that conclusion, the question comes to be considered who is responsible for this case having been presented to your Lordships without these matters having

been adjusted; and I certainly am of opinion that the appellants are themselves to blame. In the first instance, they insisted upon what now, by the judgments of all the Courts and by your Lordships' judgment, turns out to be an untenable proposition; and then, when an offer was made to them by the Court of Appeal, according to the practice of the Court in such cases, that they should pay that which (as the Court of Appeal of course meant) according to the practice of the Court would have been payable, if there was an error in the figures, those who were there on behalf of the appellants ought to have put the figures right, and if there was an error in directing the money to be paid to Messrs. Johnson & Weatherall instead of into Court, they then ought to have intervened and to have called attention to that circumstance. Instead of doing that, they allowed the Court of Appeal to make that order upon the hypothesis on which they then proceeded, and it was not until the matter came before your Lordships that the facts were accurately stated. Therefore, although I propose that there should be a variation of the order of the Court of Appeal in pursuance of what I have said, I believe your Lordships will think it right that the appellants, who are responsible for what has occurred, should pay the costs in this House, although they are to a certain extent successful.

LORD WATSON:—

My Lords, I am of the same opinion. It appears to me that the bill referred to throughout the 37th section of the Solicitors Act 1843 is the whole bill as delivered; and upon considering the terms of the section I am unable to assent to the argument which has been addressed to us on behalf of the appellants (which seems to have been the only argument pressed upon both the Courts below), to the effect that under the statute the Court has power to direct that one item or branch of the bill delivered shall be taken and remitted to the taxing master for examination.

I think the application was intended to be in terms of the Solicitors Act. The reference which it makes to the statute, and the whole scope of it, appear to me to point to that result. At the same time I do not think that your Lordships are precluded,

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in a matter like this, from exercising the power which belongs to the Court, apart from the terms of the statute.

North J. dealt, in my opinion quite rightly, with the case that was presented to him, and went no further. In the Court of Appeal their Lordships were prepared to dispose of the case upon the same principle which had been followed by North J. in the Court below, but at the same time they ex gratiâ made the appellants an offer which had certainly not been pressed upon them. The obvious intention of the Court was to give them that which they asked, a separation of the branches of the account, under its jurisdiction apart from statute, and subject to the condition upon which alone that jurisdiction has been exercised since the time of Lord Eldon. I think, in these circumstances, we cannot listen to any argument upon the amount which was fixed by the Court below. In that respect the Court appears to have received no assistance whatever from the party whose interest it was to inform the Court of the correct amount of the balance then due.

It appears to me, that throughout the appellants have repeated a contention which is ill-founded. They rejected in the Court below the principle which they are now prepared to accept, and which they ask us to apply to the case. Any error in its application in the Court of Appeal is due to the appellants themselves, and I think that they ought to bear the consequences.

LORD MORRIS:—

My Lords, I concur in the judgment which has been pronounced by the noble and learned Lords who have preceded me. We concur in the principle of the decision embodied in the order made by the Court of Appeal. It is corrected only in two matters—one a matter of figures, and the other of procedure as regards the lodgment of money in Court in place of payment over to Messrs. Johnson & Weatherall. Neither of these matters, as it appears to me, would have altered the course taken by the appellants if they had been aware at that time that the sum due would have been only £1000 instead of £1188, or that they should lodge it in Court instead of paying it to Messrs. Johnson & Weatherall. Of course it would have been more beneficial to Messrs. Johnson & Weatherall to get the money into their

pockets, by which they could obtain interest upon it pending the taxation of the costs, instead of having it lodged in Court where they would get no interest upon it.

I therefore concur entirely in the judgment.

Ordered that the order of the Court of Appeal be varied as follows: that upon payment into the Chancery Division of the High Court of Justice by the appellants of the sum of £746 3*s.* 9*d. within ten days from the* 27*th of March,* 1890, *the date of the judgment of the House of Lords, the bills of fees, charges and disbursements delivered on and subsequent to the* 4*th of January,* 1886, *in* Mellor *v.* Swire *to the appellants by the respondents be referred to the Master to be taxed; and that in default of the said sum of* £746 3*s.* 9*d. being paid within the time limited as aforesaid the order of the Court of Appeal be affirmed; in any event and whether the said sum of* £746 3*s.* 9*d. be paid within the time limited or not the appellants to pay the costs here and below: cause remitted to the Chancery Division.*

Lords' Journals 27th March 1890.

Solicitors for appellants: *Shaw, Tremellen, & Kirkman, for William Keating Taylor, Manchester.*

Solicitors for respondents: *Johnson, Weatherall, & Sturt.*

[HOUSE OF LORDS.]

H. L. (E.) 1890 April 22.

DOW HAGER LAWRANCE . . . . . APPELLANT;

AND

LORD NORREYS AND OTHERS . . . . RESPONDENTS.

Striking out Statement of Claim—Frivolous and Oppressive Action—Statute of Limitations (3 & 4 *Will.* 4, *c.* 27), *s.* 26—*Concealed Fraud.*

In a case of concealed fraud within sect. 26 of the Statute of Limitations (3 & 4 Will. 4, c. 27), it is not enough to prove a concealed fraud; the plaintiff must shew that he or some person through whom he claims has been by such fraud deprived of the land sought to be recovered, and that the fraud could not with reasonable diligence have been known or discovered more than the statutory period before the action was brought.

In such an action general averments of fraud are not sufficient: the statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the deprivation, and excluding other possible causes. In default of such allegations the Court may, by virtue of its inherent jurisdiction, dismiss the action as an abuse of the procedure, where the claim is incapable of proof and without any solid basis.

The decision of the Court of Appeal (39 Ch. D. 213) affirmed.

APPEAL from an order of the Court of Appeal discharging an order of Stirling J. and dismissing an action brought by the appellant against the respondents as vexatious and oppressive and an abuse of the process of the Court (1). The circumstances and pleadings are set forth at length in the report of that decision, and are concisely stated in the judgments in this House.

1889. Dec. 12, 13. *Warmington* Q.C. and *Upjohn* for the appellant:—

That the statement disclosed a good cause of action and would not have been demurrable under the old practice was decided by Stirling J. and assumed (without deciding it) by the Court of Appeal. And Bowen and Fry L.JJ. seem to have thought that the act of Jonathan Lawrance, in fraudulently persuading the solicitors not to give the son of their late client the information

(1) 39 Ch. D. 213, 230.

as to his title which they were about to give him and to hand over the title deeds to Jonathan Lawrance instead of to the rightful heir, was a fraud (1). Not revealing the information would not be enough, but this was intercepting a communication about to be given and title deeds and documents without which the heir could not have made out his title, and which enabled Jonathan to take possession. That is a "concealed fraud" within sect. 26 of 3 & 4 Will. 4, c. 27 as defined by Kindersley V.C. in *Petrie* v. *Petrie* (2). There was perhaps no legal duty in the solicitors to tell the heir, but there was a moral duty; and there was a legal duty to hold the title deeds for the rightful heir, the son of their deceased client. But duty or no duty, the intercepting the communication and papers was a concealed fraud, just as much as if a letter written and ready for the post had been intercepted.

[LORD HERSCHELL:—The heir seems to have made no inquiry as to his father's property. The statement of claim does not allege that the heir had no other means of discovering his rights or shew that the plaintiff was "deprived of the estate by the fraud."]

It is sufficient to allege (as is here alleged) that the plaintiff was deprived of the estate by a concealed fraud, the fraud of which particulars are given being such as might or was calculated to deprive him of it. Since demurrers were abolished a pleading is not to be read so strictly: the Court must under Order 25, rule 4, see if it discloses a "reasonable cause of action or answer": *Dadswell* v. *Jacobs* (3), per Cotton and Lindley LJJ. That rule is "more favourable to the pleading than the old procedure by demurrer": *Republic of Peru* v. *Peruvian Guano Company* (4), per Chitty J. But if the statement of claim be bad, that is matter for amendment; not a ground for dismissing the action.

The ground on which the Court of Appeal dismissed the action as vexatious was independent of the above question of pleading and of the orders and rules. The reasons given were

(1) 39 Ch. D. 228.
(2) 1 Drew. 397.
(3) 34 Ch. D. 281, 284.
(4) 36 Ch. D. 489, 495.

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that in his first action the plaintiff omitted to allege any fraud, and that the allegations made in the second action were in the opinion of the Court unsubstantial and existed only in the imagination of the plaintiff. Such reasons are quite inadequate. An action founded on a good cause of action cannot be dismissed merely because success is highly improbable. There is no precedent for or principle in such a decision. "The theory of the law of this country is, that every subject has a right to bring his complaint to a hearing, if it be not capable of being stopped by a demurrer or a plea," subject to certain exceptions not now in question: *Seaton* v. *Grant* (1), per Lord Cairns. The earliest reported instance of an action being dismissed as frivolous and vexatious and an abuse of the process of the Court, independently of any rules and by virtue of the inherent jurisdiction of the Court, is *Castro* v. *Murray* (2) decided in 1875. That action was dismissed as being absolutely groundless and pretenceless. That decision was followed in *Dawkins* v. *Prince Edward of Saxe-Weimar* (3), where the action was dismissed on the ground that the House of Lords had already decided that such an action would not lie. Lastly in *Metropolitan Bank* v. *Pooley* (4) the action was dismissed because it was apparent on the statement of claim that there was no ground of action. In all the above instances no facts were in dispute. Here there are facts for the jury; and there is no precedent for exercising the inherent jurisdiction of the Court to dismiss an action under such circumstances. Under the old practice of demurrers it was compulsory to decide against the plaintiff if the declaration was bad. That is not so under Order 25 rule 4 or under the extraordinary jurisdiction of the Court: it is a matter for discretion, and the Court may if it thinks right refuse to stay an action, though the claim would have been demurrable under the old practice.

Rigby Q.C. *Jeune* Q.C. and *W. B. Trevelyan* for the respondents were not called on.

The House took time for consideration, Lord Herschell saying

(1) Law Rep. 2 Ch. 464.
(2) Law Rep. 10 Ex. 213, 218.
(3) 1 Q. B. D. 499; 45 L. J. (Q.B.) 567.
(4) 10 App. Cas. 210.

that notice would be given if their Lordships desired to hear the respondents' counsel.

1890. April 22. LORD HERSCHELL :—

My Lords, this is in some respects an extraordinary case. The present appellant, who is the plaintiff, commenced an action in the Queen's Bench Division in June 1886 against the same defendants, claiming to recover possession of the Towneley estate in the county of Lancaster. By his statement of claim he alleged title alternatively as the heir-at-law of Richard Towneley, who died in 1706, and as the heir-at-law of Jonathan Lawrance the younger, who died, seised of the premises claimed, in 1816. A summons was taken out to dismiss the action, on the ground that no reasonable cause of action was disclosed, and that it was frivolous and vexatious. This summons was referred by the Judge at Chambers to the Divisional Court, and whilst the matter was pending there the appellant took out a summons for leave to amend, which was also referred to the Divisional Court to be heard with the other summons. The proposed amendments were framed with the view of shewing such a concealed fraud as would prevent the lapse of time operating, by virtue of the Statute of Limitations, as a bar to the action. In the result the Court made an order dismissing the action. This was admitted to be inevitable unless the proposed amendments were allowed, and the Court considered that under the circumstances before them leave to amend ought not to be granted. The present action was then brought in the Chancery Division against the same parties, upon the same title, and to recover the same estate, the allegations designed to avoid the operation of the Statute of Limitations comprising those embodied in the proposed amendments. Where an action is thus brought, on a title which accrued more than seventy years ago, to dispossess those who, or whose predecessors, have been in possession during that length of time, it is obvious that the allegations by which it is sought to prevent the statute being a bar need to be closely scrutinised. I will first call attention to what a plaintiff must prove in order to oust the ordinary operation of the statute. The Act says, "In every case of a concealed fraud the right of any person to bring

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a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered." It is not enough, therefore, to prove a concealed fraud; the person bringing the suit must shew that he or some person through whom he claims has been by such fraud deprived of the land which he seeks to recover, and that the fraud could not with reasonable diligence have been known or discovered more than the statutory period before the action was brought.

I proceed now to consider the allegations made in the statement of claim. It is noteworthy at the outset that testamentary disposition has been apparently unknown in the family, for every person named in the pedigree is alleged to have died intestate. The connecting link between the families of Towneley and Lawrance is said to have been Mary, the daughter of Richard Towneley, who married one John Lawrance and died in America in 1742. She became heiress of Richard Towneley on the failure of the issue of his son Charles. When this event occurred is not stated, but it appears to have taken place many years before 1816, for it is alleged that Jonathan Lawrance the younger was "for many years and until shortly before his death out of possession of the premises." He came from America, where he resided, to establish his title to the property, but at what date is not stated. He employed solicitors in England, and brought an action or actions, in what Court does not appear. He made a compromise with one John Towneley, whose position in regard to the property is not disclosed. "Partly by means of such actions, and partly under or by virtue of the deed of compromise," Jonathan Lawrance recovered possession of the Towneley estates. He died in 1816, seised in fee and in possession of those estates. He left behind him as his heir-at-law his son Lebius Lawrance, who was then grown up, and had a son born to him two years afterwards. But until 1886 Lebius Lawrance and the persons claiming under him remained ignorant of their title to the property. That is the story told in the statement of claim.

The story of the fraud, which is said to be a concealed fraud

within the meaning of the Statute of Limitations, and to have deprived Lebius Lawrance and those claiming under him of the property in question, is equally singular. It is this: On the death of Jonathan Lawrance his solicitors in England, who had in their possession the evidences of his title and the deed of compromise, were about to communicate to Lebius Lawrance, whose address in America they knew, the facts that his father had recovered the estates and died intestate seised of them. But John Towneley, the party to the deed of compromise, having wrongfully taken possession of the Towneley estates, intervened and fraudulently induced them not to make the communication. He further fraudulently, and with intent to deprive Lebius Lawrance of the property, induced the solicitors to deliver to him the evidences of Jonathan Lawrance's title to the property, including the deed of compromise, and having thus obtained possession of them, he fraudulently, and with the intent aforesaid, destroyed those documents. It is also alleged that John Towneley fraudulently, and with the same intent, procured to be taken up and destroyed the tombstone erected over the grave, at Walpole, in the State of Massachusetts, of Mary Towneley, afterwards Mary Lawrance, and her husband, "on which certain material particulars establishing the identity of the said Mary Towneley, and certain material particulars of her family, were inscribed," Lebius and his son being ignorant of the facts inscribed on the tombstone.

Assuming that it could be proved that the solicitors abstained, at the instance of John Towneley, from communicating to Lebius Lawrance the facts with which they would otherwise have made him acquainted, how would this shew that the non-communication of these facts by the solicitors deprived Lebius Lawrance or his successors in title of the estate? It does not appear to me to be a natural or necessary consequence. He knew that he was the heir-at-law of his father, and I take it that he knew also that his father had gone from America to England for the purpose of establishing his title to the estate. I say this because in paragraph D, where the state of ignorance of Lebius Lawrance at the time of his father's death is as to certain facts elaborately averred, he is not alleged to have been ignorant of this. An

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heir-at-law of one who, as far as appeared to him, had died intestate (for if he knew nothing of any will he would naturally assume this) would ordinarily be led to make inquiries for the purpose of ascertaining what property his ancestor had died possessed of, and the more so if he knew that the person to whom he was heir laid claim to an estate, and had shortly before his death gone to England to establish his title to it. The fraud, if committed, shut up one avenue only by which Lebius Lawrance could have ascertained his rights; it left all others open. And I am not prepared to say that, if it were proved beyond doubt, it would make good the essential element in the chain of proof, viz., that the plaintiff had thereby been deprived of the estate. What is there to shew that, in spite of the fraud, Lebius or his successor might not with diligence have ascertained their rights? No circumstances are stated here to shew how in the present case the fraud had an effect which, as I have said, does not appear to me to be a natural or necessary consequence of it. This was the view taken by Stirling J.

And I think the same observation applies to the suggested destruction of the tombstone. What is there to shew that Lebius Lawrance or his successors knew of the existence of the tombstone or would have done so but for its destruction, or that with due diligence they could not otherwise have ascertained the facts which they would have derived from an inspection of it?

Stirling J. however thought the allegation that John Towneley had fraudulently obtained possession of the deed of compromise and other evidences of title and destroyed them would, if established, be sufficient to sustain a charge of concealed fraud within the meaning of the statute. The Court of Appeal expressed no opinion upon this point. I propose to take the same course. But I must observe that it is not stated how or when the fraud was discovered. For aught that appears, so far as the facts are stated, the rights of the appellant's predecessors might have been ascertained and the means of establishing them obtained half a century ago.

The statement of claim being of the character I have described, I think it becomes important to consider the history of the liti-

gation by which the appellant has sought to assert his alleged right, and to ascertain the origin of the allegations which it contains. Stirling J. was disposed at first to treat these allegations as mere fiction, but he ultimately allowed the plaintiff to adduce evidence to shew that they were not so. The Court had, therefore, before it all the explanation which the plaintiff or his advisers have to offer of the development which the charges of fraud undoubtedly exhibit since they first took shape, and all the facts which can be suggested to shew that the claim is a genuine one.

The suggestion of a concealed fraud appears for the first time in a crude form in the amended statement of claim submitted to the Queen's Bench Division. The alleged reason why the original statement of claim was silent on the subject was, in substance, this, that Colonel Jaques, the agent of the plaintiff, late in the American army, but who had been called to the bar in America, would neither take the law from his own counsel nor trust his own solicitors with the facts, lest perchance they should fall into the hands of the enemy. He had read a reported case which led him to differ from the counsel who was advising him, and he had reason to believe, he says, that some other solicitors whom he had previously instructed "to follow up the clues" which he gave them in reference to the claim had betrayed his confidence.

A comparison of the statement of claim in this action with the proposed amendment in the Queen's Bench Division shews a distinct growth in the charges of fraud. Neither the tombstone, nor Jonathan Lawrance's litigation, nor the deed of compromise, has any place in the amended statement of claim submitted to the Queen's Bench Division. There was, however, an allusion in the course of the argument to a tombstone, and the appellant's solicitor is careful to explain that the story of the tombstone was, in substance, to be found in the instructions laid before counsel to settle the amendments, but he is unable to say why it was omitted from the proposed amendments. I can only draw the inference, either that it was not then thought of sufficient importance to be put forward, or that it was known to be incapable of proof. The story of the litigation and of the deed of compro-

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mise seems to be of later origin, and to owe its existence to the discussion in the Queen's Bench Division. The only allegation in the statement of claim then prepared was, that John Towneley obtained from the solicitors and destroyed "the evidence of title to the said premises." The counsel who was resisting the application to amend argued upon this that the best thing that could happen to the heir-at-law would be to destroy the deeds. What was the answer given by the counsel for the plaintiff? He said that the case had been argued as if the documents which constituted evidence of title must have been deeds, but when the heir-at-law claims through a pedigree, as Lawrance did, the best evidences of title are the certificates of births, deaths and marriages. Not a word about actions ending in a deed of compromise by which the ancestor obtained possession of the estate. And yet the destruction of this deed is one of the most—indeed, perhaps, the most—material allegation in the present statement of claim.

The main point to which the learned Judges in the Queen's Bench Division directed the attention of the appellant's counsel was the apparent impossibility of bringing forward any proof of such a fraud as that alleged to have been committed so far back as the year 1816. As to this, the learned counsel stated that reliance would be placed on one Richardson, who was said to have been a clerk in the office of the solicitors who acted for Jonathan Lawrance. Richardson was said to be in America, and it was admitted that he must at that time have been probably upwards of ninety years of age. Extracts were read from two letters of his, written more than thirty years ago, to certain persons, whose connection with the present case did not appear, referring apparently to some claim to the personal property of a Lawrance, and offering his assistance for a £5 note. But these letters contained no allusion of any kind to any fraud. Then it was said that Richardson had made some verbal communications to somebody in Court "in connection with the fraud." And beyond that counsel could not go. On the materials before them the Queen's Bench Division thought the story unworthy of serious attention.

Mr. Justice Stirling, as I have said, though at first disposed to

treat the allegations in the statement of claim as fiction, gave the plaintiff an opportunity of filing affidavits. The affidavit of Colonel Jaques was accordingly filed. I agree with the Court of Appeal that it is impossible to conceive anything more shadowy or unsatisfactory than that gentleman's affidavit. It does not shew how or when the alleged fraud came to be discovered. It does not shew, as might easily have been done, if the allegations were true, when and in what Court the alleged action or actions were brought. It proffers no explanation of the strange circumstance that Lebius Lawrance never inquired or never learned what his father, whose heir he was, died possessed of. There is no reference in it to Richardson, nor is there any suggestion that any means of proving the appellant's allegations can be found in any other quarter.

It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved. But the Court of Appeal did not proceed on that ground. They took into consideration all the circumstances of the case. We have, to begin with, a statement of claim which, if it discloses a concealed fraud within the meaning of the statute, does so in the barest fashion, with much that is most material left vague and undefined, when there ought to have been distinctness and precision. Moreover, this is not the first but the third edition of a statement of claim delivered with the object of recovering the Towneley estate; and when we review the history of the litigation there is much to lead to the belief that important allegations now made were an afterthought, the result of criticisms of the earlier form in which the charges of fraud were presented, and that the charges thus raised against persons long dead are wholly incapable of proof. These impressions might have been dissipated by the affidavits filed on behalf of the appellant; but they have not been. On the contrary, I think they have been strengthened. Both in what it says and in what it does not say, Colonel Jaques' affidavit confirms in my

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mind the impression that the case has not a solid basis capable of proof, but that the story told in the pleadings is a myth, which has grown with the progress of the litigation, and has no substantial foundation. For these reasons I concur with the Court of Appeal in thinking that the action is an abuse of the process of the Court. I accordingly move your Lordships, that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

My Lords, this is a case of a very unusual character. Your Lordships are of opinion that its circumstances are such as to justify the exceptional treatment with which it met in the Court of Appeal. I shall endeavour, without entering into minute details, to indicate the reasons which have led me to the same conclusion.

At the time when this suit was brought on the Chancery side of the High Court, more than seventy years had elapsed from the date at which the title alleged by the appellant accrued, and, during the whole of that period, the respondents and their predecessors remained in the undisturbed possession of the lands which he is now, for the second time, and upon substantially the same grounds, attempting to recover from them. It is sufficiently obvious, on the face of the previous common law action, as well as of the present proceedings, that the appellant's claim is barred by the Statute of Limitations, unless he can shew, in terms of sect. 26, that he has hitherto been fraudulently deprived of his estate, and of the means of recovering it.

The 26th clause of the Act reserves no remedy against purchasers for value; but the respondents do not stand in that position; and it is conceded that they are affected by the acts of their ancestor, John Towneley, to whom the frauds alleged in his pleadings are imputed by the appellant. But it is not any and every fraud which will elide the provisions of the statute, and keep alive a right of action for recovery of the lands. In order to constitute a fraud which will have that effect, these statutory requirements must be fulfilled. In the first place, it must be a fraud which has deprived the plaintiff of his land; and, in the second place,

it must be a concealed fraud, in this sense, that it was not only unknown to the plaintiff, and to those through whom he derives right, but could not, with reasonable diligence, have been discovered by him or them before the commencement of the twelve years immediately preceding the institution of his suit. The onus is, therefore, upon the appellant to allege and prove that the frauds of which he complains were of such a nature, or were perpetrated in such circumstances, that neither he nor his predecessors entitled for the time being could have come to the knowledge of them, by the exercise of reasonable diligence, during the fifty-nine years which followed the death of his great-grandfather, Jonathan Lawrance, in 1816.

In my opinion, a plaintiff who desires to avail himself of the provisions of sect. 26 is not released from the ordinary rule of pleading applicable to cases of fraud, which was thus expressed by Earl Selborne in *Wallingford* v. *Mutual Society* (1): "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice." It is not a sufficient compliance with the rule to state facts and circumstances which merely imply that the defendant, or some one for whose action he is responsible, did commit a fraud of some kind. There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and the injuries complained of stood to each other in the relation of cause and effect.

When a plaintiff, in order to escape from the Statute of Limitations, brings charges of concealed fraud, for the first time, at a distance of seventy years, it appears to me that the duty of making a full and candid statement is specially incumbent upon him. And unless the nature of the frauds alleged is in itself calculated to suggest the improbability of their being

(1) 5 App. Cas. 697.

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discovered by ordinary research, it is equally his duty to state the considerations to which he ascribes his ignorance of their existence. The amount and kind of explanatory statement required in order to impart relevancy to such charges will necessarily vary according to circumstances. But I have rarely seen a case in which fulness and candour of statement were more imperatively required than in the present; and I have met with no other case in which both were so studiously withheld. The appellant argued, as might have been expected, that he could not make a fuller statement without detailing his evidence. That is the usual excuse put forward when an attempt is made to launch a tentative charge of fraud in vague and general terms; and it rests on no better foundation than the fallacious assumption that a statement of facts and circumstances admitting of proof is the same thing with a statement of the evidence required to substantiate them.

I purposely avoid particular criticism of the defects of averment which I find in the appellant's statement of claim. One observation I think it right to make, and it is this: that his averments, so far from excluding, seem to me to point directly to the inference that the alleged frauds (if they ever were committed) could, with due diligence, have been easily discovered at any time after the news of Jonathan Lawrance's death became known to his relatives in America. Stripped of its general assertions, which are of no relevancy, the statement of claim presents to my mind a tissue of improbabilities which ought not to be sent to proof.

Such being the opinion which I entertain with respect to the character of the appellant's allegations, I concur with the Court of Appeal in thinking that the present action is in the strictest sense of the words vexatious and oppressive. With a view to that result, it is legitimate to examine not only the pleadings in this suit, but the whole probabilities of the case, and the judicial history of the claim, from first to last, which is a very singular and suggestive one. These considerations satisfy me that the order appealed from ought to be sustained, not in pursuance of any order or rule, but in virtue of the inherent jurisdiction of the Court to prevent abuse of its procedure.

LORD MACNAGHTEN:—

My Lords, I concur.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 22nd April 1890.

Solicitor for appellant: *Howell Thomas.*

Solicitors for respondents: *Ward, Mills, Witham & Lambert.*

[HOUSE OF LORDS.]

THE OWNERS OF THE SHIP "TASMANIA" AND THE OWNERS OF THE FREIGHT } APPELLANTS;

AND

SMITH AND OTHERS, THE OWNERS OF THE SHIP "CITY OF CORINTH" . . . } RESPONDENTS.

THE "TASMANIA."

Collision—Sailing Rules—Negligence.

The decision of the Court of Appeal (14 P. D. 53) reversed, and the decision of Butt J. restored, on the ground that upon the evidence as it stood at the trial there was no sufficient proof that the master of the *Tasmania* was guilty of negligence on account of which that ship should be held to blame, the decision of the Court of Appeal being based upon a point not suggested at the trial.

THE decision of the Court of Appeal from which the present appeal was brought is reported in 14 P. D. 53. It becomes therefore necessary to give some account of this appeal. The facts are fully stated in the judgments.

April 25, 28, 29. *J. Gorell Barnes* Q.C. and *F. W. Raikes* (*Arthur Russell* with them) for the appellants, contended that the view of the Court of Appeal was wrong, but as the decision of this House turned upon the facts and not on principles of law the arguments on both sides are omitted. The appellants' counsel

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cited: *The Khedive* (1): *The Byfoged Christensen* (2); *The Commerce* (3); *The Boanerges* (4); *The Ida* (5); *The Lake St. Clair* (6); *The Agra* (7); and *The City of Antwerp* (8).

Sir *Charles Hall* Q.C. and Sir *R. Webster* A.G. (*L. E. Pyke* with them) cited *The Zadok* (9).

Gorell Barnes Q.C. replied.

The House took time for consideration.

May 22. LORD HERSCHELL:—

My Lords, this action was brought by the owners of the *City of Corinth* against the owners of the *Tasmania* to recover the loss and damage sustained owing to a collision between the two vessels. The collision took place about 7 P.M. on the evening of the 8th of March 1888, in the English channel, about twenty miles S.S.W. of St. Catherine's Point. It is not in dispute that when the vessels were approaching one another prior to the collision, the course of the *Tasmania* was about W.N.W., she being close hauled to the wind on the port tack, and that the *City of Corinth* was running free. Her course is stated in the preliminary act filed on behalf of the plaintiffs to have been E. by N. when the other vessel was first seen, the wind being S.W. by S. It is clear that under these circumstances it was the duty of the *City of Corinth*, in obedience to the rules, to get out of the way of the *Tasmania*, whilst the latter vessel was bound to keep her course. That the *City of Corinth* starboarded and so brought herself across the bows of the *Tasmania* could not be contested; but it was attempted at the trial to justify this manœuvre on her part by the allegation that the *Tasmania* had luffed so as to shew her green light to the other vessel. The learned Judge who tried the action came to the conclusion that the *City of Corinth* had wholly failed to establish this case. He accordingly

(1) 5 App. Cas. 876, 904.
(2) 4 App. Cas. 669.
(3) 3 Wm. Rob. 287.
(4) 2 Mar L. C. 239.
(5) 2 Mar. L. C. 414.
(6) 3 Mar. L. C. (N.S.) 361.
(7) Law Rep. 1 P. C. 501.
(8) Law Rep. 2 P. C. 25.
(9) 9 P. D. 114.

found that she was to blame for improperly starboarding and so bringing herself across the course of the *Tasmania* instead of getting out of her way.

The Court of Appeal took the same view, and it was not contended at your Lordships' Bar that the finding that the *City of Corinth* was to blame ought to be disturbed.

At the trial no other point was taken for the plaintiffs except that which I have mentioned. It was not argued, or suggested, that even if the *City of Corinth* was to blame for improperly starboarding, the *Tasmania* was also to blame. But in the Court of Appeal this point was for the first time raised. It was contended that the *Tasmania* had kept her course too long, and that she ought to have earlier taken the step which she ultimately did, viz., putting her helm down, and so coming up to the wind.

My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.

It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.

Although, having regard to the relative position of the two vessels, it was the duty of the *Tasmania* to keep her course, it is clear that she would not be justified in blindly persisting in that course if it were manifest that disaster must result from it. It is provided by Rule 23 that in obeying and construing the rules, due regard shall be had to any special circumstances which may render a departure from them necessary in order to avoid imme-

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diate danger. As soon then as it was, or ought to a master of reasonable skill and prudence to have been, obvious that to keep his course would involve immediate danger, it was no longer the duty of the master of the *Tasmania* to adhere to the 22nd Rule. He was not only justified in departing from it, but bound to do so, and to exercise his best judgment to avoid the danger which threatened. But in estimating the conduct of the master, it must be remembered that it was the gross negligence of the other vessel which placed him suddenly in the difficult position of having to judge when he was justified in departing from the rule and what manœuvre he ought to adopt. In the case of *The Bywell Castle* (1), the present Master of the Rolls said: "I am clearly of opinion that when one ship by her wrongful act suddenly puts another ship into a difficulty of this kind, we cannot expect the same amount of skill as we should under other circumstances. Any Court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances, and the Court ought not in fairness and justice to him to require perfect nerve and presence of mind enabling him to do the best thing possible." With this I entirely agree, though of course the application of the principle laid down must vary according to the circumstances. One other fact must be borne in mind. The occurrences we are considering happened at night, so that the only information either vessel had of the position or movements of the other was derived from the lights exhibited. If it had been daylight, so that the master of the *Tasmania* could have seen what the other vessel was, and how it was manœuvring, the obligation to act might have been more imperative and immediate.

I do not think the master of the *Tasmania* was bound to alter his course directly he saw the green light of the vessel. And this, I gather, was the view taken in the Court below. It was said by the Master of the Rolls that his obligation to do so arose as soon as it was clear that the *City of Corinth* had made up her mind to go straight across the bows of the *Tasmania*, and that the action of the *City of Corinth* was so determined, so clear, that he must and ought to have known this almost immediately after

(1) 4 P. D. at p. 226.

he saw the green light. The first question that arises is, how long did he delay before he took action with his helm. I agree with the Master of the Rolls that in these cases it is not of much use talking of minutes or seconds, that time can only be judged by ascertaining what was done in the interval. It appears certain that but a short period must have elapsed between the time when the green light of the *City of Corinth* was first seen and the collision. That light was seen by the *Tasmania* about two points on her port bow. The *City of Corinth* was running before the wind, making six to seven knots; the speed of the *Tasmania* was only three to four knots, yet, without any substantial alteration of the course of the *Tasmania*, she struck the other vessel nearly amidships.

The Master of the Rolls founded his conclusion that the captain of the *Tasmania* delayed too long to order his helm to be put hard down upon the evidence as to what was done after the captain saw the green light, and before he gave this order. He says: "We have now the length of the ship; she is a long ship, and the lights are placed on the forecastle, or at the edge of the forecastle. The captain was on the poop; he sent an apprentice, or a man, along the length of the ship, and told that man to see whether his lights were burning or not. It must have taken time to go forward and come back again. After that man had gone forward and come back, he delays still. He calls the mate upon the poop to be a witness that it was not his fault, and that the collision was inevitable. . . . There is another delay, and it is not until after he has sent the man forward, and he has come back, and he has called the mate on the poop and consulted with him, that he then gives an order."

Now, I cannot feel satisfied that if the point now taken had been taken at the trial, so that we had an exact narrative of the events and their sequence, the delay of the captain would have appeared to be anything like so considerable as is suggested. It must be remembered that these events were not material to any issue raised at the trial, and therefore not carefully inquired into. There can be no doubt that the master did hail the second mate, who, as we know, was occupied at the crossjack, to send a man forward to see if the lights were burning brightly, and that

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the man sent forward reported that they were, though it does not follow that he came back for this purpose to where the captain was standing. He might well make his report without doing so. It is stated by the learned Judges in the Court below that it was not until after the man had returned with this report that the captain called the second mate on to the poop. In the absence of any questions upon the point at the trial, I do not think it is right to assume this. It is true that the master mentions the report received about the lights in connection with the order to look at them, and before he says anything about hailing the mate to come on the poop. The questions and answers run thus: "(*Q.*) Then you told us that you kept your course, and you sent a man forward to look at your lights and he reported they were all right?—(*A.*) Yes.—(*Q.*) What order did you give?—(*A.*) Then I hailed out to the second mate to come on to the poop and see what this light was going to do." But I think it is consistent with this that he called the mate on to the poop directly after he had hailed him to send a man forward. It would be quite natural for the master to complete the narrative as to the ship's lights by stating what was reported about them, even although the next order was given before that report was received. At all events, I cannot think that it is right to assume, as against the master, that he waited until the report came back before he ordered the mate on to the poop. The second mate, who was called as a witness, makes no mention in his evidence of the order to send a man forward. After stating that he got an order to haul the crossjack up, after the red light was seen, he is asked: "(*Q.*) What was the next thing that you heard after you got the order to haul the crossjack up?—(*A.*) The captain called me up on the poop and showed me a green light on the port bow." No question was put to him as to whether this was before or after the report as to the lights. In his deposition before the Receiver of Wreck he mentions one of the apprentices having been sent forward, but it comes in his narrative after the mention of his having been called aft to see the green light, and after he had observed that the light was exhibited by a full-rigged ship. I do not think it possible to suppose that he has here narrated the events in their order.

Again, I can find no evidence that any appreciable delay was caused by the master consulting with the mate. The master says nothing of any conversation with the mate after he hailed him to come on the poop to see what the light was going to do, nor does the mate, whose evidence seems to me to suggest that the order to luff was almost immediately given. There is no allusion to any consultation in the deposition of the master, and all that the mate says in his deposition is, that "the master suddenly called him aft and pointed out a green light on the port bow, observing that the red light had disappeared."

Naturally enough no question was asked of the master as to this statement, which was then regarded by both sides as quite immaterial.

The Master of the Rolls comments with severity upon the act of the master in sending to see whether his lights were burning. "What did it signify," he asks, "whether his lights were burning or not? It looks to me as if he was getting evidence to shew that he was not in the wrong. It was a mere waste of time." Now, my Lords, I cannot help observing that the master was never asked his reason for taking this step. And it seems to me hard that he should have had no opportunity of explaining his act. It was suggested in the argument at the bar that his conduct was not so unreasonable as it might at the first blush appear to be. Attention was called to the evidence of the master that he did not in the first instance suppose that the green light was borne by a ship, and that he, consequently, did not expect to see one. "(*Q.*) What was it you expected?—(*A.*) A small cutter asking me to take a pilot ashore, or something like that; I did not think a ship would do such a thing as to cross a ship's bows." He was not cross-examined with reference to this statement, and it does not appear to me to be unnatural that this should have been his first idea. If this was the state of his mind, it might excuse some hesitation in arriving at the conclusion that it was his duty to alter his course. But, further, it is suggested that it might occur to him at the same moment to inquire whether his lights were burning in order to learn whether the other vessel could be acting in ignorance of his presence. These

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suggestions do not seem to me so improbable that they ought to be summarily rejected.

Upon a careful review of the whole of the evidence, I am not prepared to say that if the question now in issue had been raised at the trial, it would not have appeared that the delay was less than has been supposed, nor is it clear to my mind that the captain could not have satisfactorily accounted for such delay as there was, and thus shewn that he could not justly be held, in the difficult circumstances in which he was placed, to have exhibited a want of reasonable care and skill. On the contrary, I think it quite possible that a sufficient explanation might have been forthcoming. And I cannot feel that under these circumstances the very meague and unsatisfactory evidence bearing upon the point now in controversy warrants a finding that the master was guilty of negligence on account of which the *Tasmania* should be held to blame.

It may be that if the point had been raised at the trial, and the evidence touching it more fully taken and probed, it would have appeared that the master was in default. But if so, the respondents must take the consequences of the course which they adopted. In my opinion it would be wrong, where a point has not been taken that might have been, to run any risk of doing injustice to the party against whom it is afterwards made by acting upon evidence which does not establish beyond doubt that the occurrences, if fully investigated, would have justified the conclusion at which the Court is asked to arrive.

A subordinate point was urged on behalf of the respondents. It was said that after the master gave the order to put the helm down the mate interfered with that order, and told the man at the helm to put his helm up, so as not to get the sails aback. This point also is a new one, though there was some cross-examination with regard to it at the trial, the object being to support the contention that the *Tasmania* had luffed at an earlier period, and by shewing her green light had deceived the *City of Corinth*. The respondents' case, on this point, rests upon the evidence of Campbell, who was at the wheel at the time, and upon statements alleged to have been made by him after the

collision. The mate denies that he gave such an order. And the captain, who is stated by Campbell to have been close by, so that he could have heard what the mate said, denies that he heard any such order given or gave it himself.

I do not think the charge is made out. It seems to me extremely improbable that, on such an occasion, with a collision imminent, the mate should, immediately after the order had been given, take upon himself the responsibility of interfering with it. Campbell was extremely ill after the shock of the collision, and had to be taken to hospital when he left the ship. And I think it would be unsafe to rely on his somewhat confused statements, as against the positive evidence of the mate, supported, as I think it is, by the probabilities of the case.

For these reasons I think the judgment of the Court of Appeal ought to be reversed, and the judgment of Butt J. restored.

LORD MACNAGHTEN:—

My Lords, on the evening of the 8th of March, 1888, the *Tasmania*, an iron sailing ship of 2175 tons register, outward bound from London to San Francisco with a general cargo, was in the English Channel off the Isle of Wight, about twenty miles S.S.W. of St. Catherine's Light. There she came into collision with another iron sailing ship, the *City of Corinth*, of 1220 tons register, manned by a crew of thirty hands, on a voyage from South America to Hamburg, with a cargo of nitrate of soda. The *City of Corinth* sank immediately, with all hands but two, who managed to clamber on board the *Tasmania*. The *Tasmania* was seriously injured, and had to put back for repairs.

Butt J. found the *City of Corinth* alone to blame for the disaster. The Court of Appeal held both ships in fault. The *Tasmania* was condemned, not for infringing any of the precise and positive rules laid down in the regulations for preventing collisions at sea, but because, in the opinion of the Court of Appeal, the officer in charge of the *Tasmania* ought to have acted sooner than he did on the view that a departure from those rules was necessary. The singular part of the case is that the error attributed to the *Tasmania* does not seem to have been apparent to any one until the parties came before the Court of

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Appeal. It was not noticed at the trial by the presiding judge; it was overlooked by his nautical assessors; and though a foundation for the charge has been discovered in the pleadings, it escaped, for the time, the attention of the learned counsel for the *City of Corinth*.

The collision occurred about 7.10 P.M. The night was dark with a slight haze or mist. The wind was blowing fresh from the S.W. magnetic. The *Tasmania*, a four-masted vessel, square-rigged on the three foremost masts, and fore-and-aft rigged on the after-mast, was close hauled on the port tack, making about three or four knots an hour, steering full and by, and heading about W.N.W. or N.W. by W.½W. magnetic, under courses, top-sails and main-top-gallant sail.

The *City of Corinth*, a full-rigged ship with three masts, was running free up channel under all square sail, at the rate of about seven knots an hour.

The two vessels were about a mile and a half apart when the look-out on board the *Tasmania* first saw a light from the *City of Corinth*. It was a red light on the port-bow. The look-out reported it to the second mate, who was then in charge of the vessel, and got back the answer "All right." The light was about two points on the port-bow. About two minutes afterwards the captain, who had gone below for his tea, came on deck. The second mate called his attention to the light. The captain noticed it, and then told the mate to go and haul the cross-jack up. The cross-jack was on the third mast. It seems it was the practice to haul it up every evening in the Channel to give a better view and make the ship more handy at night. The captain says that the order on this occasion was given, not on account of the light which had been reported to him, but in the ordinary course of managing the vessel, and that he came on deck intending to give the order. The mate went to the cross-jack. The captain stood watching the light from the poop. Shortly afterwards he went to the door of the chart-room, which was on the poop, got his night-glasses, and continued to watch the light through them. It was still red—he saw it quite plain—and it kept about the same bearing. Then, after some minutes, he was putting his glasses into his pocket—there was some difficulty in

shoving them in, he says—and he looked up, and as he looked up he saw that the light was green He hailed out to the mate to send a man forward to look at his own lights, and see if they were burning brightly. They were burning all right. Then he called the mate to come on the poop to see what the light was going to do. It was still about two points on the port-bow. Almost immediately afterwards the hull and sails of a large ship came in sight. The captain called out, "Helm hard down!" The mate ran aft to the wheel and saw the order obeyed. The captain saw the mate turning the wheel the right way. Then he ran forward to the forecastle head So did the mate; and as he went along he let go the top-sail halyards and the main-top-gallant halyards. The sails were just beginning to shake; but before the vessel answered her helm more than half a point or so she ran into the *City of Corinth* amidships, striking her almost at right angles.

Such is the narrative told by the *Tasmania's* witnesses. The evidence of the two survivors from the *City of Corinth* was of little value. They did not come on deck till the last moment; but from their account it would seem that the *Tasmania's* light was not observed from the *City of Corinth* until the two ships were close together.

On these facts it cannot be disputed that under the regulations for preventing collisions at sea it was the duty of the *City of Corinth* to keep out of the way of the *Tasmania*, and the duty of the *Tasmania* to keep her course. It is clear, therefore, that up to the time when the green light of the *City of Corinth* was opened the *Tasmania* was not in the slightest degree in fault. Further, it is not disputed that when the *City of Corinth* loomed in sight the captain of the *Tasmania* acted rightly in departing from the statutory rules. The time, therefore, to be accounted for is the interval between the appearance of the green light of the *City of Corinth* and the moment when the *City of Corinth* herself became visible. The interval was not long. The distance between the two ships when the green light first appeared is put at four ships' length, or 400 yards, the *Tasmania* being 278 feet long; it is put at 200 yards when the *City of Corinth* became visible. If those estimates are at all to be trusted, the time to

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be accounted for, having regard to the speed at which the ships were going, would be something over half a minute.

The Court of Appeal held that the *Tasmania* ought to have altered her course immediately after the green light of the *City of Corinth* appeared, and that the captain wasted precious time owing either to want of presence of mind or to a desire to secure evidence as to the state of his own vessel. The Master of the Rolls thought that it was an idle thing on the part of the captain to inquire about his own lights. He also thought that the captain had no business to summon the mate on the poop and hold a consultation with him. His view was that if the captain had kept his presence of mind he would have known that the *City of Corinth* had made up her mind to go straight across his bows, and he would have done at once, when he saw the green light, that which he did at the last moment, when it was too late. Whether any action on the part of the *Tasmania*, when the green light was first seen, could have prevented a collision is a matter on which no certain opinion is expressed.

I am unable to agree with the view of the Court of Appeal. It must be borne in mind that, until the hull and sails of the *City of Corinth* came in view, the officer in charge of the *Tasmania* could know nothing of the approaching vessel or of its course, except what he could infer from the light which he had seen. He knew that it was a sailing vessel; he knew that it had starboarded; but he could not know what sort of a sailing vessel it was. In his examination-in-chief the captain of the *Tasmania* says that when he first saw the green light he did not expect to see a ship; he expected to see a small cutter asking him to take a pilot ashore, or something like that. He did not think a ship would do such a foolish thing—he did not expect a ship would do such a thing as cross a ship's bows. It was said in argument that this was an afterthought, a mere invention on the part of the captain; but it does not seem to be an improbable story. It seems to have been accepted as a rational explanation at the trial, and there was not a word of cross-examination about it.

Nor can I agree with the Master of the Rolls, that it was an idle thing on the part of the captain to inquire whether his own

lights were burning. If his lights were not burning there would be nothing to warn the approaching vessel of its danger; the only chance of escape would be for the captain of the *Tasmania* to alter his course at once without regard to the regulations. On the other hand, if the *Tasmania's* lights were in order, it would be a most imprudent and dangerous thing to alter the *Tasmania's* course so long as there was any possibility of the approaching vessel avoiding collision by keeping out of the way of the *Tasmania*. For anything that the captain of the *Tasmania* could have known, it might have been the case that, at the very moment when the green light opened, the approaching vessel was in the act of altering her helm in order to pass the *Tasmania* on her port side, trusting to the *Tasmania* keeping her course, as she was bound to do under the regulations. If that had been the case, and if the *Tasmania* had not kept her course, it would have been difficult indeed for the *Tasmania* to have justified her action in a Court of law. She might have been held solely to blame. How could the captain of the *Tasmania*, having seen nothing but the lights of an approaching vessel, know what was passing in the mind of that vessel's captain? How could he tell that that vessel had determined at all hazards to cross his bows? In point of fact, judging from what appears in the evidence of the survivors from the *City of Corinth*, she had formed no determination whatever with reference to the *Tasmania* when she opened her green light; apparently she had not seen the lights of the *Tasmania*, and did not know that she was in the way.

Nor, again, do I think that it ought to be assumed that the inquiry as to the lights took any appreciable time. Certainly there is no evidence that it did. There is evidence that there was a man whose duty it was to attend to the lights; there is evidence that the man on the look-out turned round the moment he saw the green light and ascertained that the *Tasmania's* lights were burning brightly, so that it would be a mere matter of hailing along the deck, and the answer might have been, and probably was, reported instantly. But it is to be observed that, whether the inquiry took any time or not, it is clear, if you

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accept the evidence of the captain, it did not delay his action for a single moment. He did not think he would be justified in departing from the regulations until he could see something of the approaching vessel. The moment he caught a glimpse of her he put his helm hard down.

Further, I am unable to find any trace of anything like a consultation between the captain and the mate at the critical moment. It seems to me that there was nothing improper, nothing tending to shew irresolution or hesitation on the part of the captain in his desiring to have the mate beside him when he was watching to see what the light would do and what sort of a vessel it was that was coming. Certainly it was an advantage to have the mate there, if it were only for the purpose of helping to carry out such orders as the exigency of the case might require.

A suggestion was made that the captain's orders to the helmsman were interfered with by the second mate. I notice the suggestion merely for the purpose of saying that, in my opinion, it is not supported by the evidence.

In the result, therefore, I am of opinion that the charge of negligence against the *Tasmania* has not been established.

It is not without much consideration that I have come to the conclusion that the unanimous judgment of the Court of Appeal, supported as it is by the opinion of their nautical assessors, ought to be reversed. Speaking for myself, I could have much wished that in this case, and in all cases of this sort, your Lordships also could have the advantage of skilled advice. But I must say that I am disposed to mistrust a view of the facts of a case which did not present itself at the time to those who heard the story from the lips of the witnesses, and I cannot help adding that I think it would have been a matter of regret, and not, perhaps, of the best example, if your Lordships had been compelled to determine the case against the captain of the *Tasmania* upon a ground that was not urged during the trial, and in reference to which he was asked no questions, and given no opportunity of explanation.

I concur in the motion which has been proposed.

LORD MORRIS:—

My Lords, the *Tasmania*, a four-masted vessel of 2175 tons register, on a voyage to San Francisco, at about 7 P.M. on the 8th of March, 1888, came into collision with the *City of Corinth*, a full-rigged vessel of 1220 tons register, which sank immediately after the collision, and the whole of the crew, with the exception of two, were drowned.

Butt J., assisted by two of the Elder Brethren of Trinity Corporation, pronounced the collision to have been occasioned by the fault of the master and crew of the ship *City of Corinth*. On appeal the Court of Appeal, assisted by two nautical assessors, found in favour of the appellants, in so far "that the collision had been occasioned by the fault or default of the master and crew of the *Tasmania* as well as by the fault or default of the master and crew of the *City of Corinth*." Both ships carried the lights prescribed by the regulations, viz., a red light on the port side and a green light on the starboard side. The case made on the trial before Butt J. on the part of the *City of Corinth* was that the *Tasmania* was to blame in having altered her course, contrary to her duty under article 22 of the Regulations. The decision of Butt J. was that the *Tasmania* had not deviated from her heading, and was consequently not to blame.

That the *Tasmania* did not deviate from her course or attempt it till immediately before the collision was in your Lordships' House admitted by the respondents, but the inconsistent case was made in the Court of Appeal and before your Lordships that the *City of Corinth* had violated the regulation so grossly and determinedly that the captain of the *Tasmania*, seeing that, ought to have altered his course and disobeyed the ordinary rule of keeping his course. The Court of Appeal has decided in accordance with that contention, and consequently found the captain of the *Tasmania* to blame equally with the captain of the *City of Corinth*.

My Lords, on the evidence I would incline to the opinion that the captain of the *Tasmania* acted as promptly as a reasonable, prudent man could who was called on suddenly on seeing the green light of the *City of Corinth* within about four lengths of

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his vessel. He knew he was on his own right course, and it seems to me an awkward argument on the part of the respondents that the captain of the *Tasmania* was at once to arrive at a distinct and clear conclusion that the *City of Corinth* was pertinaciously to continue in the wrong course which she had taken since he had first sighted her. From the time he saw the green light of the *City of Corinth*, and thereby could for the first time at all know or anticipate anything of danger from the wrong course taken by the *City of Corinth*, until the collision actually took place, was a matter of seconds of time, not more certainly than a minute. He should consider the gravity of departing from his right course and whether it would be justifiable to do so in consequence of the imminent danger. The policy of making rules is that they should be observed. In my opinion, large allowance should be made for sudden consideration whether directory rules should be disobeyed in order to avoid collision, and when such collision is caused by the misconduct of the party complaining, there should, in my opinion, be very clear proof of contributory negligence.

I cannot concur in the opinion that the inquiry by the captain of the *Tasmania* whether his own lights were properly burning was a useless one. If his own lights were not right, it might account for the strange course the *City of Corinth* had taken, while if burning properly he might expect that the *City of Corinth* would at the last moment alter her helm and pass the *Tasmania*.

Nor do I consider it at all unreasonable that at such a supreme moment he should have called his mate beside him. In my opinion, the captain of the *Tasmania* did not act with irresolution, but gave his order to put his helm hard down reasonably, promptly, and with decision.

I should however have felt great, if not insuperable difficulty, acting on my own opinion, in reversing the order of the Court of Appeal in a case of this kind, except for this reason; the whole course of the trial before Butt J. was on an entirely different contention on the part of the respondents. There is no trace of any contention that the captain of the *Tasmania* delayed improperly in changing his course when it became necessary to avoid

imminent danger; on the contrary, the charge was that he had improperly altered his course and thereby led to the collision. The evidence was addressed to that contention, and it would be most dangerous and unfair, in my opinion, to spell out conclusions on a new issue from answers in the evidence which were given to questions on a different and inconsistent issue.

I confess I should have much wished for the assistance of skilled nautical assessors in dealing with such a case as the present; but as I cannot find satisfactory evidence on which the *Tasmania* should be held to blame, I think the judgment of Butt J. should be restored.

Judgment appealed from reversed and judgment of Butt J. restored, with costs here and below: cause remitted to the Admiralty Division.

Lords' Journals 22nd May 1890.

Solicitors for appellants: *Waltons, Bubb, & Johnson.*
Solicitors for respondents: *Gellatly & Warton.*

J. C.*

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[PRIVY COUNCIL.]

BROWN AND OTHERS . . . . . PLAINTIFFS;

AND

THE COMMISSIONER FOR RAILWAYS . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Compensation for Lands taken—Mineral Contents of Land—Onus Probandi—Practice as to New Trial.

Where in an action for compensation in respect of land compulsorily taken for public purposes the jury, after hearing the conflicting evidence of experts as to the existence of payable coal thereunder, assessed damages in respect thereof:—

Held, that their verdict, being one which a jury could reasonably find, could not be set aside as against the weight of evidence.

There is no rule which imposes upon a plaintiff in order to sustain such verdict, the burden of proving by costly experiments the mineral contents of his land; nor does it follow that because a seam of coal is not presently workable at a profit that no compensation is to be given for it if it is likely to prove profitable in the future.

APPEAL from an order of the Supreme Court (June 4, 1888) making absolute a rule nisi for a new trial in an action brought by the appellants, in which a verdict for £6600 had been obtained as damages for lands, viz., 7A. 23P., taken by the respondent under the Colonial Railway Act, 22 Vict., No. 19.

In accordance with that Act the question of compensation was, in the first instance, referred to arbitrators appointed by either party, who appointed as umpire Dr. James Robertson. The arbitrators having disagreed, the umpire made his award, and thereby awarded to the appellants the sum of £6555.

The appellants, being dissatisfied with this award, instituted this action to have the compensation settled by a jury.

The case made for the appellants was that in addition to the surface value of the 7A. 23P. of land taken for the purpose of

* *Present*:—LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, and SIR BARNES PEACOCK.

constructing the railway thereon, the appellants were entitled to compensation for the value of two seams of coal underlying the said 7A. 23P., and also for the damage done to the appellants by reason of the severance of 21A. of the appellants' lands, immediately adjoining the 7A. 23P. on the north-west side thereof, whereby the appellants alleged that they were prevented from working and winning the two seams of coal under the 21A.

It was admitted that the two seams of coal existed or had been found in the close vicinity of the appellants' lands (and it was also admitted that a fault or "roll" occurred below the appellants' lands), and the questions contested in evidence were whether the seams of coal existed below the 7A. 23P. and the 21A., or any portion thereof, or whether, if they existed at all, they were of a quality workable at a profit.

Finlay, Q.C., and *Macrae*, for the appellants.

Sir *Horace Davey*, Q.C., and *Leverson*, for the respondent.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

This is an application to set aside an order for the new trial of an action in which the appellants were plaintiffs.

At the date of the events which gave rise to the litigation the appellants were, as they still are, landowners and colliery proprietors in the Colony of New South Wales, possessing land within the area of the Newcastle Coal Basin, and engaged in working a colliery on their property there known as New Lambton.

The action was brought to enforce a claim for compensation in respect of lands taken or resumed by the Government for the purpose of a proposed railway, and also in respect of injury by severance to adjoining lands.

The claim was presented under three heads:—

1. Surface value of the lands taken.
2. Value of coal under those lands.
3. Value of coal under adjoining lands severed by the railway.

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As regards the first head of claim no question was raised before their Lordships.

The lands taken were 7A. 23P. The lands alleged to be injured by severance were 21A. lying to the north or north-west of the railway, and forming a triangle of which the line of the railway where it passes through the appellants' property is the base.

In the first instance the parties had recourse to arbitration. The arbitrators appointed as their umpire a Dr. James Robertson, who was an important witness at the subsequent trial. Dr. Robertson was a mining engineer of considerable eminence in his profession. He seems to have had experience in all parts of the world. He had spent ten years in England and six years in the Colony, acting principally as consulting engineer, and he had been appointed president of a Royal Commission by the Government of New South Wales.

The arbitrators were unable to agree, and Dr. Robertson, as umpire, awarded £6555 in respect of the appellants' claim.

The appellants were dissatisfied with the amount awarded, and duly served a notice to that effect in accordance with the Colonial Railway Act, 22 Vict., No. 19, sect. 41. It then rested with them to enforce their claim by action.

Accordingly they brought an action against the Commissioner for Railways as nominal defendant. The amount claimed by the declaration was £20,000.

The action came on for trial before Faucett, J., and a jury of twelve persons in April, 1887.

It was not disputed on the part of the respondent that if there was workable coal under the lands severed, the appellants were entitled to be paid for it as well as for the lands taken. But the respondent's case was that there was no coal, or at any rate no coal that could be worked at a profit, under any part of the lands taken or severed. On the other hand, it was not disputed by the appellants that there existed a considerable roll or fault along the line of the railway, for which a large allowance ought to be made.

On obtaining possession of the land taken for the purpose of the railway the Government caused two trial shafts to be sunk, one at each extremity of the line passing through the appellants'

property. These trial shafts were each about 150 feet deep. About fifteen feet from the trial shaft at the western extremity a bore was made with a drill to the depth of 200 feet. Near the eastern extremity, but beyond it and distant about fourteen yards from the eastern trial shaft, there was an old pit called the Furnace pit, originally intended as a winding shaft, and afterwards used as an air-shaft in connection with the New Lambton old workings. The persons employed to sink the trial shafts caused a drive to be made into the Furnace pit from the adjoining trial shaft.

There were no workings of the appellants within the lands in question, nor did they sink any shaft or boring there for the purpose of testing the ground, nor was the ground tested in any way except by means of the two trial shafts, the drill-bore, and the drive connecting the eastern trial shaft with the Furnace pit.

It was not disputed that no workable coal was to be found in either of the trial shafts or in the drill-bore, or in the Furnace pit, which was admittedly sunk on a fault, or for some distance along the drive which connected the Furnace pit with the old workings.

The old workings lay to the north of the line of railway. The official plan of these workings was produced. It shewed some faults and occasional disturbances, but nevertheless the workings appeared to be extensive. They reached southwards to a point very near the lands in respect of which compensation was claimed.

A few years before the action was brought—the exact date does not appear in the record—the appellants stopped working to the north of the railway, took out the pillars, and allowed the roof to fall in. At the same time they sank a new pit about a mile to the south of the railway, which is known as the C pit, and they commenced operations there which have been continued ever since.

The reason why the old workings were abandoned was a matter of dispute at the trial. The appellants alleged that the coal was good where they left off, but that, as they had been working to the dip, the water came in upon them, and that it was for this reason,

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and this reason alone, that they transferred their operations to the C pit. In support of this assertion they proved that latterly the cost of pumping in the old workings was from £20 to £25 a week. They called the mining engineer under whose advice the move was made. He and their manager and several miners stated that the coal was good where they left off in the old workings. On the other hand, it was alleged by the respondent that the real reason why the old workings were abandoned was that the coal was thinning out as the appellants worked southwards. Some miners were called, who said that the coal was bad where they were working at the southern extremity of the old workings, and reference was made to the plan furnished to Government on which two notes were found in these words, "Coal bad; stopped November, 1878;" "Stopped January, 1881; bad roof." A suggestion was hazarded by the appellants' present manager, that the entry "Coal bad" was made dishonestly by a former manager in the interest of some or one of the partners who were then quarrelling among themselves. But there seems to be no foundation for this suggestion. Much reliance was placed upon these entries both at the trial and in the Court of Appeal, and in the argument before their Lordships. It is possible that the words "Coal bad" may be explained by a circumstance deposed to by Mr. Neilson, a colliery manager of experience, who acted as arbitrator between the men and their employers in New Lambton, and was well acquainted with the old workings. He says, "At the K end"—that was taken by the learned counsel on both sides to refer to some spot at the southern extremity of the old workings—"they got into a lot of faults and dykes and disturbed coal, and after a short distance they got into good coal, 4ft. 9in." This explanation would be consistent with what is said by Mr. Mackenzie, the Examiner of Coalfields for the Colony of New South Wales, who was a witness for the respondent. According to his statement it was in 1875, not in 1878, that it was found that the coal was bad there. In September, 1875, he made, he says, a section shewing where the seam was growing bad, and had a conversation with one of the appellants on the subject. However this may be, it was not disputed before their Lordships that the character of the coal

at the southern extremity of the old workings, so far as it was material for the determination of the question in issue at the trial, was a matter entirely for the consideration of the jury.

There was also a dispute as to the character of the coal in the new workings at the C pit. It was in evidence that there were about 120 men employed there, "raising 172 tons of best coal and sixty tons of good sack coal daily," and opening out the colliery in order to bring the long wall system into full operation. About half the men were working on the side nearest the railway. It was asserted on behalf of the appellants, that although faults and local disturbances were not infrequent there, as indeed seems to be the case throughout the district, there was no difference in the quality or thickness of the coal in the direction of the railway. This assertion appears to be corroborated by the circumstance that in the C pit Dr. Robertson, in company with the arbitrators, took no less than seven measurements of the seam from which the coal was got, and that he was not cross-examined as to those measurements. Those measurements would have been obviously unfair if they did not shew the thickness of the seam in the headings nearest the railway. If they had not shewn that, Dr. Robertson no doubt would have been cross-examined on the point. For the respondent must have known where these measurements were taken: his arbitrator must have checked them. If they had shewn that the seam was thinning out in the direction of the railway, that fact must have been brought out on cross-examination. On the other hand, two miners who worked in the C pit were called by the respondent, and they said the seam was getting worse towards the railway. One of them stated that in the north-west headings the men knocked off nine months before the trial—that would be about the time of the arbitrator's inspection—and he added that he thought the coal was not payable there. This question again was a matter entirely for the consideration of the jury. They not only saw the witnesses, but they had before them explanations far more complete and precise than could be reproduced on a judge's note. For example, it appears by the manager's evidence that the places where the men were employed were pointed out to the jury on the plan of the colliery. But no in-

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dications are to be found on the judge's notes or on the plans accompanying the record to shew the exact situation of those places.

The case made by the expert witnesses on behalf of the appellants was in substance this, that there was good coal to the north of the railway, and also good coal to the south, and that there was every reason to believe that, but for the local disturbance at the Furnace pit, the coal ran through from north to south in continuous seams, and that the great probability was that that local disturbance affected only a part of the lands in question. In coming to these conclusions the witnesses were guided by their practical knowledge of coalfields in general, and of this coalfield in particular. Whether this view be right or wrong, it seems to be something more than mere conjecture.

The first and principal witness at the trial on behalf of the appellants was Dr. Robertson, the umpire. He explained in detail how he had arrived at his award. He allowed for two seams of coal, the Borehole seam—the seam mainly worked in the district, and the only one worked by the appellants in their old workings—and an upper seam locally known as the Yard seam. He made his calculations on a royalty value of 9*d.* per ton for the Yard seam and 1*s.* per ton for the Borehole seam. In consequence of the roll, he only allowed for coal under two-thirds of the lands taken and under nine acres of the lands severed, and he based his calculations as to the thickness of the two seams on measurements which he had taken in company with the arbitrators when he inspected the workings of the C pit with them. In cross-examination Dr. Robertson was not asked one single question as to his calculations, or indeed as to any material point.

The other expert witnesses called on behalf of the appellants took substantially the same line, though they did not go into calculations. One, however, thought the Yard seam not workable at a profit. One thought that Dr. Robertson had made too large an allowance for the roll; and two considered that the appellants, as working owners, were entitled to more than a royalty allowance as landlords, and that at least 1*s.* 6*d* or 2*s.* per ton ought to have been allowed.

The expert witnesses on behalf of the respondent put forward a very different view. They thought there was no coal, or at any rate no workable coal, under the lands in question. Their view was that, as those lands were approached, from whatever direction the approach might be made, the coal thinned out or disappeared. They based their opinion on the fact or the assumption that the New Lambton old workings had been abandoned because the coal failed, and that in the new workings the coal deteriorated in the direction of the railway; on the fact that no workable coal was to be found in the two trial shafts or in the Furnace shaft, or in a pit sunk some little distance to the west by the Waratah Colliery Company, called the Stuart pit; and on the fact that some pits to the east or south-east, known as the Middle pit, the Mosquito pit, the Far pit, and the Raspberry pit, had been abandoned or were not then working. As regards these latter pits, however, there was some evidence to shew that they all contained coal of a workable thickness, and perhaps the circumstances under which the working of these pits was stopped were not sufficiently before the jury to make any inference drawn from the stoppage of much weight.

The respondent took his stand on the case made by his expert witnesses, and on that alone. He did not condescend to deal with Dr. Robertson's calculations either by counter evidence or by way of cross-examination. So the only alternative presented by the respondent to the acceptance of Dr. Robertson's figures was the absolute and entire rejection of the appellants' claim.

The trial lasted seven days. The jury deliberated for five hours. They were unable to agree, and, by consent, the verdict of the majority was taken. By a majority of seven to five the appellants obtained a verdict for £6600.

No objection was taken to the summing-up. The learned judge who tried the case, as appears from the observations of one of the learned judges in the Court of Appeal, stated that probably he would have found the other way, but that he did not disagree with the verdict.

A rule nisi for a new trial was granted on the grounds (1) that the verdict was against evidence or the weight of evidence, and (2) that the amount awarded was excessive.

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The rule was argued before Darley, C.J., and Innes and Stephen, JJ., on the 2nd and 3rd of November, 1887. Judgment was reserved. On the 4th of June, 1888, the Court (Innes, J., dissenting) ordered that the verdict be set aside, and a new trial had between the parties, and that the costs of the first trial should abide the event of the new trial, and that the costs of and incidental to the motion for the new trial should be paid by the present appellant.

Innes, J., was of opinion that there were ample materials to warrant the verdict, though there was a strong body of evidence the other way.

Darley, C.J. (with whom Stephen, J., agreed), was of opinion that the verdict was "demonstrably wrong, and such as reasonable men discharging judicial functions ought not to have found." In estimating the value of Dr. Robertson's evidence, he laid stress on the fact that Dr. Robertson "entirely disregarded, and never even went down," the Furnace pit. As this circumstance was also pressed to the disadvantage of Dr. Robertson by the learned counsel for the respondent, their Lordships think it right to observe that, in their opinion, no significance ought to be attached to it. In the arbitration Dr. Robertson heard the evidence and made an inspection with the arbitrators. That was proved. It was also proved that both the arbitrators went down the Furnace pit. There was no doubt or dispute as to what was to be seen in that pit, and if the arbitrators were agreed upon that point there does not seem to have been any reason why the umpire should have gone down himself. However, upon this and other grounds which are not very apparent, the learned Chief Justice came to the conclusion that the evidence of the experts on behalf of the appellants was "purely conjectural," while the respondent's case was "not founded upon mere opinion, but upon ascertained facts." Among these facts, however, it is to be observed that the learned Chief Justice seems to reckon the respondent's contentions that the New Lambton old workings were abandoned because the coal was bad, and that in the new workings the seam diminished in thickness in the direction of the railway—two matters which were in contest at the trial, and which were apparently determined by the jury adversely to the

respondent. The learned Chief Justice lays much stress on the two trial shafts sunk by the respondent, which, no doubt, were very important pieces of evidence for the jury to consider. Dr. Robertson, indeed, stated that they were not sunk to "a sufficient depth to test the existence of coal," and upon this he was not cross-examined, though the respondent was aware that the core from the bore at the trial shaft was taken to Sydney and shewn to him. But, assuming, as seems to have been the case, that the trial shafts were sunk to the Borehole seam or to a section of that seam, which appears to have been split there by the roll, it is to be observed that, although these trial shafts afford cogent evidence to prove that the roll or fault extends from the Furnace pit along the line of railway, they do not necessarily prove that workable coal may not be underlying the greater part of the lands in question.

The learned Chief Justice then expresses himself as follows:—"In my opinion the evidence furnished by these trial shafts, taken in connection with the other evidence for the defendant, renders it incumbent on the plaintiffs to shew, not as a matter of conjecture resting on the opinion of experts, but as a matter of fact, that coal does exist either under the railway or under the twenty-one acres, and this can easily be ascertained by the plaintiffs sinking a trial shaft upon some part of the twenty-one acres. It is impossible to suppose that the plaintiffs did not know that the defendant was sinking trial shafts, and it is to my mind significant that, knowing this, they did not sink a trial shaft on their own account. Looking, however, at all the circumstances of the case, I am of opinion that it is incumbent for the plaintiffs, before they can recover this large amount of compensation from the defendant, to prove that coal, payable coal in fact, exists underneath this land." Their Lordships are unable to agree in this view. If a plaintiff fails to make good his claim to the satisfaction of the tribunal which has cognizance of it, he must of course bear the consequences. But, in their Lordships' opinion, it would be wrong to lay down such a rule as the learned Chief Justice seems to enunciate, and to impose upon a person whose land has been taken from him against his will the burden of proving by costly experiments the mineral

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contents of his land as a condition precedent to obtaining compensation, merely because the opinion of experts may be in conflict on the subject, or because, in the opinion of a Court of Appeal, the weight of the scientific evidence is adverse to the claim.

The learned Chief Justice then deals with the Yard seam, and assuming, possibly correctly, that the jury had followed Dr. Robertson in allowing compensation for it to the amount of £1988 15*s.* 9*d.*, less 6 per cent., expresses his opinion that, according to the evidence, that seam was not workable at a profit. This point was also urged very strongly by the learned counsel for the respondent. It may be observed that there is no actual proof that the jury took the Yard seam into consideration. The sum awarded might be arrived at either by taking the Yard seam into account at Dr. Robertson's valuation, or by disregarding the Yard seam altogether, and giving compensation for the Borehole seam at the larger royalty of 1*s.* 6*d.* per ton, to which some of the witnesses thought the appellants, as owners working their own mines, were clearly entitled. However that may be, there was certainly evidence to go to the jury as to the value of the Yard seam. Generally throughout the district it is not worked because it is too thin; but Dr. Robertson's measurement of 3 ft. 6 in. in the New Lambton new workings was not questioned, and that seems to be a workable thickness. Further, it must be borne in mind that it does not follow because a seam is not presently workable at a profit, that no compensation is to be given for it if it is likely to prove profitable in the future.

On the whole, their Lordships are of opinion that the question in issue at the trial was a matter for the jury to determine, and that it is impossible to say that the verdict was one which a jury, viewing the whole of the evidence reasonably, could not properly find. The jury may have thought, not without reason, that in the conflict of scientific evidence it was safer to rely on the evidence of Dr. Robertson and those who agreed with him than on the evidence of the witnesses for the respondent. Expert witnesses are apt to make themselves partisans, and thus diminish the weight of their testimony. In Dr. Robertson the jury had before them a gentleman of eminence and skill, who

had been selected as umpire between the parties, and who does not appear, in anything that he said at the trial, to have departed from the position of impartiality which he occupied in the arbitration.

On the other hand, without disparaging the eminence or skill of the experts who were called on behalf of the Government, one cannot help seeing that the leading witness on that side, the gentleman who seems to have managed the case for the Government throughout, must have failed to carry the weight to which he was perhaps otherwise entitled in consequence of his propounding and insisting upon a theory which he illustrated by a coloured map, but which was proved, and indeed admitted, not to be altogether accurate. Again, although Mr. Mackenzie, the Examiner of Coalfields, and Mr. Dixon, the Inspector of Mines, spoke with the authority due to their position, it came out in the course of the evidence that the Government had consulted other gentlemen who were not examined at the trial, and whose reports, though called for, were not produced. The jury may have thought, and perhaps not without reason, that in a case of this sort, where private property is taken by the Government for public purposes, the Government are bound to give the jury all the assistance in their power, and are not at liberty to keep back any information in their possession, whether it makes for or against them.

In the result, therefore, their Lordships will humbly advise Her Majesty that the appeal ought to be allowed, and that the order of the 4th of June, 1888, ought to be discharged, and that the respondent ought to pay the costs of the trial, and of the rule nisi and of the rule absolute.

The respondent will pay the costs of this appeal.

Solicitors for the appellants: *Wyatt & Barraud.*
Solicitor for the respondent: *R. C. Want.*

[HOUSE OF LORDS.]

H. L. (E.) 1890 June 19.

JAMES CROSSLEY ENQ . . . . . APPELLANT;

AND

WILLIAM GEORGE DUNN . . . . . RESPONDENT.

Trade Mark—Registration—Words calculated to Deceive—Application of Words to a different Article—"Fruit Salt"—Patents, Designs, and Trade Marks Act 1883 (46 & 47 *Vict.* c. 57), s. 73.

The Patents, Designs, and Trade Marks Act 1883 confers upon the comptroller a discretion whether to register a trade-mark or not, and he ought to refuse registration where it is not clear that deception may not result.

The respondent applied to register the words "Dunn's Fruit Salt Baking Powder" as a trade-mark for baking powder. The appellant, who had for many years used the words "Fruit Salt" as his trade-mark for a powder used in producing an effervescing drink, opposed the application:—

Held by Lords Watson, Herschell, and Macnaghten, (Lord Halsbury L.C. and Lord Morris dissenting) that upon the evidence the proposed words were as a matter of fact calculated to deceive the public, that the case therefore fell within sect. 73 of the Patents, Designs, and Trade Marks Act 1883, and that the trade-mark ought not to be registered.

The decision of the Court of Appeal (41 Ch. D. 439) reversed, and the decision of Kay J. restored.

APPEAL from an order of the Court of Appeal reported as *In re Dunn's Trade Marks* (1).

In 1887 the respondent applied to register as a trade-mark a label representing a woman holding up a dish of cakes, with the words "Dunn's Fruit Salt Baking Powder," "The Cooks' Best Friend." The application was opposed by the appellant on the grounds: 1st, that the mark was an infringement of his registered trade-mark "Fruit Salt"; 2nd, that the use of the term "Fruit Salt" as proposed by the respondent was calculated to deceive. The respondent took out a summons that notwithstanding the opposition the application might be proceeded with by the comptroller, disclaiming any right to the exclusive use of the words "Fruit Salt." At the hearing before Kay J. evidence was

(1) 41 Ch. D. 439.

given on both sides as to the effect of which their Lordships in this House differed in opinion, and which is sufficiently referred to in the judgments. It is only necessary to state that the appellant claimed to be the inventor of a powder known as "Fruit Salt," in respect of which in 1877 he registered the words "Fruit Salt" in class 3 as a trade-mark for a "proprietary medicine for human use," and in 1878 the same words as a trade-mark in class 42 as a "dry preparation for making a non-intoxicating beverage."

Upon the hearing of the summons the appellant, being unable to prove that "Fruit Salt" had been used as a trade-mark before the passing of the Act of 1875, submitted to an order to remove his trade-marks from the register, and confined his opposition to his second ground.

Kay J. dismissed the respondent's application.

The Court of Appeal (Lindley and Fry L.JJ., Cotton L.J. dissenting) reversed this decision and made an order that the comptroller proceed with the application (1).

Against this order the present appeal was brought.

March 4, 10, 17. Sir *R. Webster* A.G. and *Aston* Q.C. (*John Cutler* with them) for the appellant, contended upon the evidence that Dunn's trade-mark, having the words "Fruit Salt," was clearly calculated to deceive, meaning as it did the powder prepared by Eno.

They also referred to *Edwards* v. *Dennis* (2); *Orr-Ewing* v. *Registrar of Trade Marks* (3); *Johnston* v. *Orr-Ewing* (4); *In re Australian Wine Importers* (5).

Moulton Q.C. and *Birrell* for the respondent contended that the judgments of the majority of the Court of Appeal were right and for the reasons there given; that this was an attempt by Eno to get indirectly a practical monopoly of the words "Fruit Salt" to which he was (by admission) not entitled; that Dunn had never claimed the exclusive use of the words "Fruit Salt," of which no one could now acquire a monopoly: that sect. 73 only applied

(1) 41 Ch. D. 439.
(2) 30 Ch. D. 454.
(3) 4 App. Cas. 479.
(4) 7 App. Cas. 219.
(5) 41 Ch. D. 278.

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where the Court would not deem the applicant entitled to protection, which was not the case here.

Sir *R. Webster* A.G. replied.

The House took time for consideration.

June 19. LORD HALSBURY L.C.:—

My Lords, I am unable to concur in the view entertained by the majority of your Lordships that the judgment of the Court of Appeal was wrong.

I think that Court put the right construction upon the 73rd section of the statute, the section upon which, I believe, we are all agreed the question must turn, and indeed I do not see that any difference of opinion exists among us as to that construction; but while I agree that no absolute right to the registration of a trade-mark is given to an applicant for registration, the meaning and intent of the statute itself is that, unless for some of the reasons contemplated by the statute there is an objection to the registration, the trade-mark ought to be registered. Unless we are of opinion there is something in the proposed trade-mark which the statute renders an objection to its registration we ought to grant the application.

I think I may dismiss all other considerations here except the objection that the proposed trade-mark comes within that part of the 73rd section which enacts that "it shall not be lawful to register, as part of or in combination with a trade-mark, any words the exclusive use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a Court of Justice, or any scandalous design." There again, I may omit to consider the words "or otherwise," and the words "scandalous design," and confine myself to the consideration of the words "Fruit Salt." The trade-mark itself is free from all objection, unless these words make it objectionable.

While the statute is wide enough to include within it any deceit, one must remember one is dealing with a trade-mark, and a deceit which is relevant to the subject-matter in debate is, as I understand, what is here insisted on. Could the comptroller

refuse to register this trade-mark upon the ground that it so nearly resembled Mr. Eno's trade-mark, already on the register, as to be calculated to deceive a purchaser into believing that he was buying Mr. Eno's powder when he was buying Mr. Dunn's? It is only necessary to place them side by side to see the difference of them even as marks. A cook with a dish of baked confectionery, with Mr. Dunn's name very prominently exhibited as the maker of a baking powder, bears no resemblance, even the slightest, to Mr. Eno's Fruit Salt, or Fruit Saline, or Fruit Powder, surrounded by grape leaves and grapes. I must add, however, that no verbal description of the difference does entire justice to the dissimilarity of the two trade-marks. If Mr. Eno were to rely upon the section which I have quoted, he would be further met by the objection that the same goods, or description of goods, form essential words in the section, and a baking powder is not a powder for an effervescing drink, nor for a medicine.

I accept the evidence as true, that "Fruit Salt" is now only applied to Eno's Fruit Salt, since it is clear that until Mr. Dunn sought to use the phrase, the words "Fruit Salt" only meant, in shops where such articles were sold, the "Fruit Salt, Fruit Saline, or Fruit Powder," which Mr. Eno sold; but it does not therefore follow that two ordinary words in the English language, though I will assume new in their combination here, become the property of Mr. Eno. Apart from what Lindley L.J. says upon this subject, though I do not disagree with him, so long as that combination of words was only applied to one thing, and that one thing was advertised as Mr. Eno's "Fruit Salt," the phrase would naturally mean Eno's Fruit Salt. But if it were applied to a baking powder, I cannot believe that anyone would suppose either that he was buying an effervescing drink, or that Eno's Fruit Salt formed an ingredient in it. It is here, I believe, the difference arises in the minds of some of your Lordships.

For my own part, I cannot conceive the possibility of an ordinary person supposing that the medicinal salt obtained from fruit by Mr. Eno was the same salt which Mr. Dunn used as a baking powder. It is the knowledge of the chemist, and not that of the ordinary person, which recognises the bitartrate of

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potassa as the basis of both. At least three salts can be obtained from, and exist naturally in, fruit. Why to the popular mind should a baking powder obtained from fruit be the same salt as that which furnishes its medicinal qualities to Mr. Eno's effervescing drink? It is admitted that Mr. Eno has no right to the exclusive use of the words. It is admitted he has no patent right in the thing, and yet a trade-mark totally unlike Mr. Eno's must not be registered, because the words in debate, to which he has no exclusive right, are calculated to deceive. I cannot think that is right.

It may be true that the statute gives no right to the applicant to be registered, which is in its nature absolute. Indeed, where so much must be left to discretion and judgment, it could hardly do so; but I do not think that is of importance here, since it clearly means that if no such objections as it points at can be made to the registration, the comptroller ought to register, and we are now in the position of the comptroller, and ought to register, if these objections do not exist. I think they do not exist here, and therefore I think the judgment of the Court of Appeal ought to be affirmed.

LORD WATSON:—

My Lords, this appeal does not appear to me to raise any serious question in regard to the construction of the Patents, Designs, and Trade Marks Act 1883, but depends upon matters of fact as to which opinions may differ.

The statute nowhere confers an absolute right to register a trade-mark. The comptroller, by sect. 62, may, if he thinks fit, refuse to register, his refusal being subject to an appeal to the Board of Trade, who may either hear parties, and decide whether and subject to what conditions, if any, registration is to be permitted, or may refer the matter to the Court for its determination. Sect. 72 (2) prohibits the registration, with respect to the same goods or description of goods, of a trade-mark so nearly resembling a trade-mark already on the register with respect to such goods or description of goods as to be calculated to deceive. That provision is supplemented by the broader enactments of sect. 73, to the effect that "It shall not be lawful to register, as part of or

in combination with a trade-mark, any words the exclusive use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a Court of Justice, or any scandalous design."

These prohibitory clauses cast upon the applicant the duty of satisfying the comptroller, or the Court, that the trade-mark which he proposes to register does not come within their scope. In an inquiry like the present, he does not hold the same position which he would have occupied if he had been defending himself against an action for infringement. There, the onus of shewing that his trade-mark was calculated to mislead rests, not on him, but upon the party alleging infringement; here he is in petitorio, and must justify the registration of his trade-mark by shewing affirmatively that it is not calculated to deceive. It appears to me to be a necessary consequence that, in dubio, his application ought to be disallowed.

I think the present case must be dealt with under the provisions of the 73rd section. If the use of the words "Fruit Salt" in the trade-mark, which the respondent asserts his right to register, would be calculated to deceive the public, such use is expressly forbidden by that clause. Whether it would or would not have a misleading effect, is, according to my apprehension, the only question arising for decision.

I do not think it necessary to refer to the evidence in detail. It appears to me to establish conclusively that although the words "fruit" and "salt" are in common use wherever the English tongue is spoken, they have in combination no technical or scientific meaning, and, before the respondent entered the field, were never applied, in popular language, to any known substance other than the article manufactured and sold by the appellant under the name of Eno's Fruit Salt. That circumstance does not give the appellant a right of property in the words "Fruit Salt," or entitle him to use them, by themselves, in a registered trade-mark; but it is nevertheless a material circumstance in considering whether the use which the respondent proposes to make of them in his trade-mark would be calculated to mislead.

I have come to the conclusion that the proposed use of the term "Fruit Salt" by the respondent might, and in many instances

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probably would, have the effect of deceiving the public. It is no doubt said that the respondent's trade-mark is for a baking powder, to be used in the manufacture of bread, whereas the appellant's mark is for a powder to be used in producing an effervescing drink; and that there can be no risk of any member of the public confounding the two things. To a certain extent the criticism is well founded. I do not suppose that persons intending to bake would buy Eno's Fruit Salt, or that persons desiring to indulge in an aperient drink would invest in Dunn's Fruit Salt Baking Powder. But I do think that there would be a supposed connection between the two articles in the minds of many persons, who would naturally assume that the baking powder had been manufactured with the appellant's fruit salt, and purchase it in that belief; so that a batch of badly made baking powder might seriously injure the credit of the effervescing powder. Having regard to the uncandid statements made by the respondent with respect to his selection of the words, I cannot avoid the conclusion that he adopted them, as they now stand in his trade-mark, with the deliberate purpose of obtaining pecuniary advantage from the wide reputation of the appellant's manufacture, and the probability of purchasers connecting it with his own baking powder. I do not for a moment suggest that everybody would be misled. Skilled chemists and persons of intelligence who gave heed to the matter might incur no risk of error; but I cannot assume that these are the only classes who may be expected to purchase packets of baking powder and Eno's Fruit Salt.

It was argued that to give effect to these considerations would be equivalent to allowing the appellant to appropriate, as his own property, two words in common use. The argument appears to me to underrate the resources of the English language, which are in my opinion quite sufficient to enable any one honestly desirous of distinguishing his own goods to use these words in a trade-mark in such a manner as to prevent any possibility of their being connected with the appellant's fruit salt.

For these reasons I am of opinion that the judgment of the Court of Appeal ought to be reversed with costs, and the order of Kay J. restored; and I move accordingly.

LORD HERSCHELL:—

My Lords, this appeal arises out of an application made by the respondent on the 29th of June 1887 to register a trade-mark, of which the words "fruit salt baking powder" formed a conspicuous element, although any right to the exclusive use of the words "Fruit Salt" was disclaimed. The appellant opposed the application on the ground that the proposed trade-mark was an infringement of a trade-mark registered by him, and also that it was calculated to deceive. On the 12th of April 1888 the respondent took out a summons for an order directing the comptroller to proceed with his application. Mr Justice Kay refused to make such an order; but the Court of Appeal reversed this decision, and ordered the comptroller to proceed. The judgment was that of the majority of the Court, Lord Justice Cotton dissenting.

It was not contended at the bar that the respondent's application to have the mark registered should be rejected on the ground that it was an infringement of the appellant's trade-mark. The only point insisted on was that it ought not to be registered because it was calculated to deceive. In order to appreciate the point it is necessary to bear in mind the facts which have been proved. I take it to be indisputable, upon the evidence, that prior to the appellant's use of the term "fruit salt" to describe the powder manufactured by him, that expression had not been in use, either in scientific or popular nomenclature, as descriptive of any substance. The combination of words appears to have been adopted by him for the first time for the purpose of describing the powder he prepared and sold. Owing to his having extensively advertised it, "fruit salt" had, at the time the respondent applied for his trade-mark, come to be well known by the public, and was largely dealt in as an article of commerce. I can draw no other conclusion than that these two words, if employed alone, would then have been understood by the public and those engaged in trade as applying to the powder manufactured by the appellant. I am, for the moment, speaking only of the use of these words by themselves. I shall have to consider presently the effect of using them in combination with others. Lord Justice Fry says that they are

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common English words, so collocated as to become descriptive, and that they convey to his mind an intelligible, if vague, notion similar to that derived from them by Mr. Clayton, the chemist, viz., that the preparation which Mr. Eno sold contained some ingredients derived from fruits. I have no doubt that this might well be so in the case of a person with some chemical knowledge; but I see no reason to think that the same idea would be conveyed to the minds of the public generally. I give credit to the evidence, which I see no reason to differ from, that the idea suggested by the words to those engaged in commerce, and to the public at large, would be Mr. Eno's powder, and that alone.

Assuming this to be so, the next question is, would the words in the collocation in which they are found in the proposed trade-mark of the respondent, viz., "Dunn's Fruit Salt Baking Powder," be calculated to deceive? I do not understand it to have been doubted that if this language would induce the public to believe that Eno's fruit salt powder was an ingredient of the baking powder, or employed in its preparation, or that the appellant was connected with the manufacture of the baking powder, the proposed trade-mark would be open to objection. But it is said that there would be no danger of any such notion being acquired by the public; that an aperient medicine and a baking powder are such essentially different things that no one would imagine that the one could enter into the composition of the other. I think this is scarcely a fair statement of the case. Fruit salt is described in its registration under class 42, in which the respondent seeks to be registered, as "a dry preparation for making a non-intoxicating beverage," although it is true that it does possess slight aperient properties, and that the trade-mark is registered also in class 3, where the description of goods is "a proprietary medicine for human use." Nevertheless, the argument remains, and is, no doubt, deserving of serious attention. I may say at once that in my opinion the appellant has no exclusive property in the words "fruit salt," and if it were proposed so to employ them that no reasonable person could suppose that they had reference to the appellant's preparation, such a use would be perfectly unobjectionable. For example, I cannot

conceive any one imagining that a "fruit salt umbrella" was in any way connected with the article manufactured by Mr. Eno. And numberless similar illustrations might be given. But I am unable to arrive at the conclusion that fruit salt and baking powder are of so essentially different a character that the one could not be supposed to enter into the composition of the other. The evidence appears to me to be cogent the other way. Two persons at least did, before this litigation was even contemplated, use Eno's Fruit Salt with success as baking powder. It not only occurred to them that this fruit salt might be so used, but they actually so employed it. I do not think the importance of this evidence was fully appreciated in the Court below. It was said, I have no doubt truly, that the appellant had never advertised or sold his preparation as a baking powder, and that his powder and the respondent's were not likely to be sold the one for the other. But this does not, to my mind, dispose of the evidence. Seeing that "fruit salt" would mean, in the eyes of the public, the appellant's powder, and that it had occurred to people to use it for the purpose of baking, does it not seem highly probable that the words "fruit salt baking powder" would convey widely the idea that the appellant's powder was one of its principal ingredients? I cannot avoid the conclusion that it would, and that the proposed use of the words "fruit salt" would be calculated to deceive. But I do not think it is necessary to go so far as this. I think it is enough to say that I am not satisfied that there would be no reasonable danger of the public being so deceived. The case was argued on behalf of the respondent as if he had an absolute right to have any trade-mark registered which was not proved to fall within the terms of either the 72nd or 73rd section of the Act. I do not so read the statute. Those sections prohibit the registration of a trade-mark in certain specified cases; but there is no duty cast upon the comptroller of registering every other trade-mark that may be applied for. On the contrary, whilst he is in certain cases prohibited from registering, a discretion whether to register or not appears to me to be in all cases plainly conferred. Of course this discretion must be reasonably and not capriciously exercised; but it is, in my opinion, a reasonable exercise of it to refuse

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registration when it is not clear that deception might not result from it.

To prevent misapprehension, I desire to add that your Lordships have not now to determine whether the appellant could in any, and, if so, in what, cases restrain the use of the words "fruit salt." I have already indicated my opinion that the appellant has no private property in them. The sole point for decision is, whether the comptroller ought to be directed to proceed with the registration of a particular trade-mark of which they form an element. For the reasons I have given, I think he ought not, and that the judgment appealed from ought to be reversed.

LORD MACNAGHTEN :—

My Lords, if it had not been for the difference of opinion to which this case has given rise, I should have thought the question before your Lordships tolerably free from difficulty.

Ever since courts of equity have interfered to protect traders in the exclusive use of marks and words which they have lawfully appropriated for the purpose of distinguishing their goods, it has been an established principle that this protection is not to be extended "to persons whose case is not founded in truth." That is said to be "a clear rule" (1).

Unfortunately, in the competition for business, a trader not unfrequently endeavours to attract custom by representing that the goods which he offers for sale are different in origin, composition, or character from what they really are. The public are constantly tempted to buy one thing when they think they are buying another. It is not, as has been observed by Lord Cairns, the province of the Court "to protect speculations of this kind" (2).

Between rival traders, the application of the principle is necessarily a matter of extreme difficulty. But, as between the innocent public and a trader seeking registration of a proposed trade-mark, there is, I think, no room for hesitation or doubt. The statute allows any person to oppose an application for registration, whether he has or has not a personal interest in the

(1) *Pidding* v. *How*, 8 Sim. 477, 480.

(2) *Estcourt* v. *Estcourt Hop Essence Company*, 10 Ch. 276, 281.

result. It declares that it is not lawful to register as part of or in combination with a trade-mark any words, the exclusive use of which would, by reason of their being calculated to deceive, be deemed disentitled to protection in a court of justice. It seems to me that in registering trade-marks the principle to which the enactment so plainly refers ought to be applied without any qualification whatever, and that the comptroller, to whom in the first instance is committed the "discretionary power," as it is termed in the Act (sect. 94), of registering a trade-mark ought to reject words which involve a misleading allusion or a suggestion of that which is not strictly true, as well as words which contain a gross and palpable falsehood.

In the present case the evidence shews that the expression "Fruit Salt" has come to mean Mr. Eno's preparation, that at present it means nothing else, and that Mr. Eno's preparation is well known and very popular. Mr. Dunn adopts the expression "Fruit Salt," and gives it a prominent position among the words he seeks to register. I have no doubt that those words are calculated to deceive. They are calculated, and I think designed, to create a confusion in the minds of those persons to whom Mr. Dunn's advertisements are addressed, and to lead the ordinary run of such persons to suppose that his baking powder is in some way or other connected with Mr. Eno's preparation. The object I think was—and if Mr. Dunn's application were successful the result, I am convinced, would be, in some cases at any rate—to induce people to buy under an impression "not founded in truth," and not perhaps the less misleading because it is vague and indefinite, and incapable, it may be, of bearing the very slightest examination. Mr. Eno has not and cannot have any exclusive property in the expression "Fruit Salt." The words of which it is composed are common English words; anybody may use them in any manner and in any connection he pleases, provided the use to which they are applied is not calculated to deceive.

The learned judges who were in favour of Mr. Dunn in the Court below seem to have come to the conclusion that Mr. Dunn's object was to obtain the benefit of the celebrity which the name adopted by Mr. Eno has acquired, but that it was not his object

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to steal Mr. Eno's trade. So far I am disposed to agree; but I do not think that those propositions cover the real question. The question is one between Mr. Dunn and the public, not between Mr. Eno and Mr. Dunn. It is immaterial whether the proposed registration is or is not likely to injure Mr. Eno in his trade. Equally immaterial, as it seems to me, is the fact that for a considerable time Mr. Eno had on the register, as his trade-mark, the words "Fruit Salt." Mr. Eno may have gained some advantage to which he was not properly entitled; but that is hardly a reason for permitting Mr. Dunn to practise a deception upon the public.

I am of opinion that the decree under appeal ought to be reversed, and that the decision of Kay J. ought to be restored.

LORD MORRIS:—

My Lords, I concur with the conclusion arrived at by the Lord Chancellor in this case.

The facts which it is necessary to recapitulate are these: the appellant had caused to be registered the words "Fruit Salt" as a trade-mark: the label printed in the appendix to the case represents it thus: "Eno's Fruit Salt, Fruit Saline, or Fruit Powder—a dry preparation for making a non-intoxicating beverage."

The respondent applied for registration of a trade-mark consisting of a label having thereon, "Dunn's Fruit Salt Baking Powder." A representation of the respondent's label is also set out in the appendix. Except that the two labels use the words "Fruit Salt," they could scarcely be more dissimilar.

The appellant opposed the respondent's application upon two grounds: 1st, that the trade-mark proposed to be registered was an infringement of the appellant's trade-mark in using the words "Fruit Salt"; 2nd, that the use of the term "Fruit Salt" was calculated to deceive.

The respondent, on the other hand, contended that the appellant had never been entitled to be registered in respect of the words "Fruit Salt" as a trade-mark. This contention was yielded to by the appellant, and he submitted to an order to remove the words off the register. The case is consequently

out of the 72nd section of the Act of 1883, and is narrowed to one point. Is the respondent's use of the words "Fruit Salt" calculated to deceive within sect. 73? The respondent stated in his affidavits that he adopted the words "Fruit Salt" from a copy of Brande's Manual of Chemistry. No such phrase is in the book, and I discredit the statement. The respondent obviously adopted the phrase from the appellant's use of it.

The words "Fruit Salt" in connection are not per se calculated to deceive; for the baking powder has a main constituent, bitartrate of potassa, a salt contained in fruit. But, as I understand it, the appellant contends that buyers of the respondent's baking powder would believe, from the use of the words "Fruit Salt," that it was an adaptation of the appellant's so-called invention. This contention is, in my judgment, untenable. It appears to be founded on the assumption that the term "Fruit Salt" is a fancy phrase invented by the appellant, who has given evidence that none of the ingredients of his fruit salt were salts found in fruit. I can arrive at no other conclusion than that the use of the two words "Fruit Salt," words of ordinary English, when used in that connection, imply that there was a salt extract from fruit in the preparation, and I must act on my own understanding of the words "Fruit Salt, Fruit Saline, or Fruit Powder," as, in their ordinary signification, meaning that some salt extract from fruit formed an ingredient of "Eno's Fruit Salt Powder."

The appellant's contention is founded on a supposed invention of an arbitrary term or fancy phrase, "Fruit Salt," whereas it appears to me to be the description of an ingredient of his powder, whether truly or untruly stated to be so.

In my judgment the case stands thus: Eno advertises that he has a powder for producing an aperient drink of which salt derived from fruit enters into the preparation, while Dunn advertises that he has a powder for baking bread of which salt derived from fruit enters into the preparation. Why is Dunn suggesting anything deceptive in truly stating that his baking powder contains fruit salt, because Eno had previously used the same words to convey that his aperient drink contained it? The appellant, however, has given evidence to prove that his fruit

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salt powder does not contain any ingredient of salt extracted from fruit, and, as I understand, relies upon that evidence to establish that the words "Fruit Salt" must be taken to denote only a fancy description of his preparation, and not a description of any of the ingredients of which it was composed. But, in the view I entertain, that argument would lead to this result, that Eno, because he has deceived the public into the belief that his powder for making a drink contained salt derived from fruit, can now prevent Dunn from truly stating that his powder for making bread contained it, because, forsooth, the catch-words "Fruit Salt," used to describe the ingredient in both compositions, may deceive a purchaser of these most dissimilar and different articles of consumption and use.

To avoid so untenable a position the appellant resorts to what appears to me an extraordinary contention, namely, that his powder might be used as a baking powder also, and that consequently his trade for baking purposes might be interfered with, and that persons who wanted "Eno's Fruit Salt Powder" to bake might be deceived into buying Dunn's ditto. This argument wants a foundation in fact. It is true an archdeacon at Pietermaritzburg, when unable to obtain baking powder, states he used Eno's Fruit Salt for baking in 1877 and 1880, and apprised Eno of the fact; and the appellant's accountant states that his wife had used it for four years past as a baking powder, and two other witnesses depose to the same, on experiments made, I collect, after this action had commenced, as no date is given, and the experiments are stated to have been lately made; the same evidence could be given of the possible use of a seidlitz powder.

Can it be gravely asserted that such a use of the aperient drinking powder could ever be an ordinary one, or that it was ever contemplated by Eno, or that he could or would adopt such a trade of his powder? He has never advertised or purported to sell it to bake bread. In my opinion there is nothing in the use by Dunn of the words "Fruit Salt" to deceive purchasers; and in deciding in favour of the appellant we should practically give him the exclusive right to the use of the words "Fruit Salt," though admittedly incapable of being registered

by him as a trade-mark, to the exclusive use of which words he is not entitled. H. L. (E.) 1890 ENO v. DUNN.

I am of opinion the judgment of the Court of Appeal should be affirmed.

Order appealed from reversed and judgment of Kay J. restored with costs here and below: cause remitted to the Chancery Division.

Lords' Journals 19th June 1890.

Solicitors for appellant: *Garrard, James, & Wolfe.*
Solicitors for respondent: *Radford & Frankland.*

[HOUSE OF LORDS.]

THE COLONIAL BANK . . . . . APPELLANTS;
AND
JOHN CADY AND JOHN CHARLES WILLIAMS . . . . . RESPONDENTS.

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THE LONDON CHARTERED BANK OF AUSTRALIA . . . . . APPELLANTS;
AND
JOHN CADY AND JOHN CHARLES WILLIAMS . . . . . RESPONDENTS.

Shares—Pledge of Certificates—Blank Indorsement—Brokers—Mercantile Usage—Defective Title—Estoppel.

The registered owner of shares in a New York company held certificates which stated that the shares were held by him and were transferable in person or by attorney on the books of the company only on the surrender and cancellation of the certificate by an indorsement thereof. The indorsement was in the form of a transfer for value received, blank in the names of the transferor and transferee, with a power of attorney in blank to carry out the transfer. On the death of the owner his executors obtained probate of his will, and in order that the shares might be registered in their own names signed as executors the transfers on the back of each certificate, without filling up the blanks, and sent the certificates to their broker, who fraudulently deposited the certificates with a bank which took them bonâ fide and without notice as security for advances. The bank retained the certificates and took no steps to obtain registration.

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By the law of New York such a delivery of signed transfers by the registered owner of shares would estop him from setting up his title against a purchaser for value without notice. But neither on the New York nor on the London Stock Exchange are transfers so signed by executors treated as being in order or received as sufficient security for advances, unless duly authenticated. The executors having brought an action against the bank to establish their title to the certificates:—

Held, that since all the dealings with the certificates were transacted in England by persons domiciled there, the respective rights of the executors and the bank must be determined by English law; that the conduct of the executors in delivering the transfers was consistent either with an intention to sell or pledge the shares or to have themselves registered as the owners, and therefore did not estop them from setting up their title as against the bank, for the bank ought to have inquired into the broker's authority.

The decision of the Court of Appeal (38 Ch. D. 388) affirmed.

THESE appeals from two orders of the Court of Appeal were heard together. The facts are set out in the report of that decision (1), and may be shortly stated thus:—

J. M. Williams was at his death the registered holder of 1210 shares in the New York Central and Hudson River Railroad Company, the certificates for which were in the form set out in the judgment of Lord Herschell. After the death of Williams the respondents, his executors, desired to have the shares transferred to their own names; and for that purpose in January 1881 sent the certificates to Thomas, Sons & Co., their London brokers, having previously signed as executors the blank transfer on the back of each certificate. In February and April 1881 Blakeway, one of the partners in Thomas, Sons & Co., in fraud of the executors delivered the certificates with other property to the Colonial Bank as security for advances to his firm. In August 1883 certificates representing 500 shares were returned to Blakeway who then pledged them to the London Chartered Bank of Australia with other property as security for a loan. In February 1884 Thomas, Sons & Co. were adjudicated bankrupt. The respondents having discovered the frauds brought actions against the Colonial Bank and the London Chartered Bank of Australia respectively to establish their title to the shares and to restrain the banks from dealing with the shares

(1) 38 Ch. D. 388.

held by them respectively. The banks resisted on the ground that, though all the dealings with the shares had been in England the case must be governed by the law of the State of New York, and by that law delivery of the certificates with the indorsed transfer signed passed to the banks the legal and equitable title to the shares. At the trial before Kekewich J. evidence was given as to the law of the State of New York and as to the usage in New York and London, the effect of which is stated in the judgments of Lords Watson and Herschell.

The Court of Appeal (Cotton, Lindley and Bowen L.JJ.), reversing an order of Kekewich J. (1), made an order in each action declaring that the plaintiffs were entitled to the certificates and the shares; and ordered that the defendants concur in all acts necessary to enable the plaintiffs to be registered in the books of the company as owners of the shares, and that the defendants deliver the certificates and pay the dividends received in respect of the shares to the plaintiffs (2). Against these orders the present appeals were brought.

Feb. 13, 14, 17, 18, 20. *Rigby* Q.C. (*Christopher James* with him) for the Colonial Bank, appellants:—

The executors having executed the transfers the title both in law and equity passed. Their secret intentions and instructions to their brokers are irrelevant; the material thing is that they enabled the brokers to represent themselves as owners. The transaction must be determined by the law of the State of New York, by which the company, the rights of the shareholders and the effect of the certificates are governed: Story, Conflict of Laws, s. 383. According to that law the documents were in a form sufficient to pass the property to a transferee, and they were so delivered to the brokers. By that law an owner who has so dealt with his certificates is estopped from setting up his title against a bonâ fide transferee for value, whatever the secret instructions to the agent may have been: *McNeil* v. *Tenth National Bank* (3), decided by the Court of Appeals; *Kortright* v. *Buffalo Commercial Bank* (4).

(1) 36 Ch. D. 659.
(2) 38 Ch. D. 388.
(3) 1 Sickels' N. Y. Rep. 325.
(4) 20 Wendell's N. Y. Rep. 91; on appeal 22 Wendell's N. Y. Rep. 348.

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The result is not different if the matter is determined by English law. The executors so conducted themselves that a reasonable person would conclude that the brokers had authority to deal with the certificates, and that is enough to estop them; per Brett J. in *Carr* v. *London and North Western Railway Company* (1). See also the principles laid down in *Baxendale* v. *Bennett* (2); *Pickering* v. *Busk* (3); *France* v. *Clark* (4). The doctrine of *Pickard* v. *Sears* (5) was applied by Lord Cairns in *Goodwin* v. *Robarts* (6). There, no doubt, the instrument was payable to bearer, here it was not. But the same principle applies: the banks could have got themselves registered as owners by having the signatures of the executors duly verified. The evidence establishes a usage to that effect both in England and America.

Latham Q.C. (*T. H. Wright* with him) for the London Chartered Bank of Australia, appellants, urged similar arguments, and distinguished the present case from that of *Lord Sheffield* v. *London Joint Stock Bank* (7), where the banks had carefully abstained from inquiry.

Sir *H. Davey* Q.C. (*Warmington* Q.C. and *Decimus Sturges* with him) for the respondents in both appeals:—

These documents would not in England or America pass from hand to hand: they were not "in order" and no one acquainted with such matters would lend money upon or deal with them. Registration cannot be got by executors without sending to the company at New York a copy of the will duly authenticated in the form required. The dealings with these certificates being in England and by people residing there must be judged by English, not by American law, if there be any difference on this point, which there does not seem to be. By English law signature in blank conveys no title, and the person into whose hands the document comes gets no title unless the transferor has so acted as to estop himself: *Lord Sheffield* v. *London Joint Stock Bank* (7);

(1) Law Rep. 10 C. P. at p. 317.
(2) 3 Q. B. D. 525.
(3) 15 East, 38.
(4) 26 Ch. D. 257.
(5) 6 A. & E. 469.
(6) 1 App. Cas. 476, 490.
(7) 13 App. Cas. 333.

Colonial Bank v. *Whinney* (1). The shares are and are expressed to be transferable on the books of the company. There was no representation on the document that the bearer gets a title. Any inquiry would have shewn the banks that upon these documents the company would not register, and the fraud might then have been discovered. Apart from negligence the mere fact that another person has the indicia of title does not estop the true owner from setting up his title. The banks ought to have inquired whether the brokers had authority to sell or pledge the shares.

[He also referred to *Bank of Ireland* v. *Evans* (2); *Swan* v. *North British Australasian Company* (3); *Mayor, &c. of Staple of England* v. *Bank of England* (4); *City Bank* v. *Barrow* (5); *Colonial Bank* v. *Hepworth* (6).]

Rigby Q.C. in reply:—

If the case is to be decided by English law it is only necessary to fall back on usage, which is sufficient. If the American law is applied the decisions there are independent of usage. This is not like the case of a man who has accepted a bill of exchange, and it has been stolen. To confer a title or create an estoppel there must be a delivery, and there was.

The House took time for consideration.

May 12. LORD HALSBURY L.C.:—

My Lords, the executors of John Michael Williams had vested in them by law the shares which are the subject-matter of this controversy. The facts which gave rise to the controversy are simply that the executors in order to get themselves registered in the books of the company entrusted the possession of the share certificates to a person named Blakeway, who in fraud of the trust reposed in him pledged the certificates to raise money for himself with the appellant banks. The share certificates were in a form which contemplated the holder of them being entitled,

(1) 11 App. Cas. 426.
(2) 5 H. L. C. 389, 409.
(3) 2 H. & C. 175.
(4) 21 Q. B. D. 160.
(5) 5 App. Cas. 664.
(6) 36 Ch. D. 36.

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when so disposed, to transfer the shares of which he was on the face of the document itself the owner by a form which, though on the same piece of paper as the share certificates themselves, was a separate instrument, and when signed by the person who on the face of the instrument was stated to be the owner, purported to transfer to some one else by the execution of this form of assignment his property in the shares.

It is admitted that the shares (or to speak more accurately the share certificates) are not negotiable instruments, and the executors being informed that in order to get themselves registered in the books of the company they must sign their names at the end of the document acted upon that assurance, and, as I have said, entrusted the possession of the share certificates (never intending to part with the property in them) to Blakeway. Blakeway was a stockbroker in London, and the transaction of loan took place in London; but the shares in question are shares in a corporation established in New York and subject to the laws of that State.

My Lords, if it were necessary to consider what law must govern, as between these parties, the right to these certificates on the one hand, and the right to detain them as pledged for the money advanced on them on the other, though the certificates themselves were the certificates of shares in a foreign corporation, I should not doubt that it is to the law of England you must look, and not to the law of the United States. But in the view which I take of the transaction in question it does not appear to me that there is any such conflict as has been suggested at the bar.

It is not denied that Mr. Williams's executors never intended to part with the property in these shares. They simply parted with the custody of them, and I am unable to follow the observation made by Kekewich J. in his judgment, when he says that "it cannot be suggested for a moment that the executors are precluded from asserting the truth." "On the contrary" (he said), "my judgment goes on an examination of the real facts." Blakeway's authority was simply to obtain the registration of the executors, and if the real facts are examined the executors never intended to part with the property, and did no act which to them at least suggested that they were giving an authority other than

what I have described; and how it can be said that apart from what Kekewich J. describes as "a familiar use of the word estoppel" they have parted with the property to some one else, I am wholly unable to understand. But the doctrine that a person shall not be permitted to represent or permit to be represented a state of facts at one time and afterwards, when such representation has induced another person to change his position, seek to shew that such his representation was erroneous, is a doctrine too well established now to be shaken, and whether it is accurately called "estoppel" or not the principle is perfectly intelligible. But Kekewich J. then goes on to say that "the executors are precluded from asserting that Messrs. Thomas were not by the custody of these documents authorized to deal with them, as they from time to time considered desirable." If this means the mere custody apart from what the instrument upon the face of it represented to any person to whom it might be exhibited, I am wholly unable to assent to any such proposition. But if it means that the document itself in the condition in which it was entrusted to Blakeway represented by its being in that condition that Blakeway was entitled to deal with it, then the decision of the learned judge becomes intelligible, but only upon the ground (which he nevertheless himself disclaims) that the executors made or permitted to be made a representation that Blakeway had full dominion over the certificates to do what he pleased with them, and which representation having been made, the executors are estopped from denying. Now the question is, have they made or permitted to be made on their behalf any such representation? With the greatest respect for the gentlemen who have given evidence on the subject of the law of New York so far as it is relevant to the matter in hand, it seems to me that the law is the same in both countries, and as I say, the question is whether expressly or impliedly the executors permitted a representation to be made by Blakeway that he was entitled to deal with the certificates as he pleased.

Now the form of the certificates, and of that which is intended to be used as a transfer when a registered owner makes the transfer, appears to me to be all-important. I have intentionally in what I have said before refused to adopt the phrase used at the

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bar, "that the executors executed the transfer." The document, such as it is, with the names of the two executors subscribed, will not read so as to be a perfect and intelligible document. The person who begins by describing himself as the owner of the shares is not the person who signs; and as Lindley L.J. very pertinently inquires, "What is it that the executors have done? What representation have they made which they are precluded from denying or explaining away?" The mere form of the document which they have signed certainly does not in itself purport to shew that they are intending to give a complete title to anybody. But undoubtedly a document may by usage become so well understood in a particular sense that a person may be well estopped from denying that when he issues it to the world it must bear the sense which usage has attached to it.

And that brings one to inquire whether it is true that the issue of this document to the world in this form would shew that the person signing had intended to give a complete title to anyone into whose hands it should come. To my mind the evidence shews beyond doubt that the document might mean at least one of two things—either that the executors were going to sell these shares and transfer them to some one else, or that they were signing in order that they might be themselves registered in the books of the company as the legal representatives of the deceased holder, John Michael Williams.

Now, if that is all that the document upon the face of it represents, and I cannot doubt that when all the evidence is looked to that is not an unfavourable mode of representing it towards the appellants, let us see what would have been the result if Blakeway, instead of simply tendering the document as security for a loan to himself, had said in plain terms to the bank what I have described as being the representation made by the document itself: "I tell you"—the bank—"I have been entrusted with these certificates for only one of two purposes, but I will not explain which, either to sell or to get the names of the owners of them registered in the books of the company." Can there be any difference between that which is stated in plain terms and that which as a matter of business ought to have been inferred from the nature of the document itself? I think none.

I am therefore of opinion that the judgments of the Court of Appeal ought to be affirmed, and these appeals dismissed with costs, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, these appeals involve the right of the appellant banks to retain in a question with the respondents certain documents of title representing 1210 hundred-dollar shares of the capital stock of the New York Central and Hudson River Railroad Company. The Company and its undertaking are American, and the rights of its shareholders, as well as the effect of its stock certificates, are admittedly governed by the law of the State of New York.

The certificates issued by the company to its registered shareholders are for ten shares each and bear in gremio that the shares are "transferable in person or by attorney on the books of the company *only on the surrender and cancellation of this certificate, by an indorsement thereof hereon,* and in the form and manner which may at the time be required by the transfer regulations of the company." The indorsement on the certificate is in the form of a transfer for value received, blank in the names of the transferor and transferee, which is obviously meant to be executed by the person who is entered in the register of the company, and in the body of the certificate, as the owner of the shares. The system thus adopted has the merit of inseparably connecting the certificate with the transfer, and so preventing the dishonest creation of a legal right by transfer to one person, and a competing equitable right by deposit of the certificate with another.

The late John Michael Williams was the registered owner of these 1210 shares for which he held certificates in the usual form. The respondents, who are executors of the deceased, were desirous of having the shares transferred to their own names; and for that purpose they, on the 29th of January 1881 sent the certificates to Thomas, Sons & Co., their London brokers, having previously, as directed by that firm, signed as executors the blank transfer on the back of each certificate. Instead of using the certificates for the purpose for which they were sent, William Evan Blakeway, one of the

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partners of Thomas, Sons & Co., on the 10th of February and the 20th of April 1881, delivered them to the appellants, the Colonial Bank, along with a mass of other securities, in order to cover advances made and to be made to his firm.

On the 15th of August 1883 certificates representing 500 of these shares were returned to Blakeway, who on the same day obtained an advance of £20,000 from the appellants, the London Chartered Bank of Australia, on the security (inter alia) of the certificates for these 500 shares, which he authorized the bank to sell or otherwise dispose of at their discretion, in the event of the advance not being repaid by the end of the month.

Thomas, Sons & Co. were adjudicated bankrupts on the 4th of February 1884, when it appears that the securities held by the appellants were not sufficient to cover their advances. As soon as the frauds practised by Blakeway came to their knowledge, the respondents applied to the appellants for the certificates then held by them for 710 and 500 shares respectively. Neither of the appellants had obtained registration in respect of these shares, which still stood in the books of the company in name of the deceased John Michael Williams; but they declined to comply with the respondents' demand, on the ground that, according to the law of New York, delivery of the certificates with the indorsed transfer signed by the respondents was per se sufficient to pass to recipients for value and without notice the full legal and equitable right to the shares. That is their main defence to these actions, which pray for a declaration that the several deposits of the respondents' certificates were fraudulent, and conferred no title on the appellants, and for delivery of the certificates.

That the interest in the railway company's stock, which possession of these certificates confers upon a holder who has lawfully acquired them, must depend upon the law of the company's domicil, seems clear enough, and has not been disputed by the respondents. But the parties to the various transactions, by means of which the certificates passed from the possession of the respondents into the hands of the appellants, are all domiciled in England; and it is in my opinion equally clear that the validity of the contracts of pledge between

Blakeway and the appellants, and the right of the latter to retain and use the documents as their own, must be governed by the rules of English law. In the application of these rules the appellants are, of course, entitled to the benefit of any privilege which the law of America attaches to possession of these documents, as conferring right or title to the property of the shares.

In so far as the law of America is concerned, your Lordships have the aid of three experts, two of whom were examined by the appellants and one by the respondents. As I understand their evidence, the principles of American law do not differ in any way, or at least in any material respect, from those by which an English Court would be guided in similar circumstances. When the indorsed transfer has been duly executed by the registered owner of the shares, the name of the transferee being left blank, delivery of the certificate in that condition by him, or by his authority, transmits his title to the shares both legal and equitable. The person to whom it is delivered can effectually transfer his interest by handing his certificate to another, and the document may thus pass from hand to hand until it comes into the possession of a holder who thinks fit to insert his own name as transferee, and to present the document to the company for the purpose of having his name entered in the register of shareholders and obtaining a new certificate in his own favour

The appellants' witnesses say that delivery of the certificate, with the transfer executed in blank, "passes the property" of the shares; but that statement must be accepted subject to the explanations by which it is qualified. The right of the holder appears from these explanations to be in the nature of a jus ad rem and not of a jus in re. Delivery does not invest him with the ownership of the shares in the sense that no further act is required in order to perfect his right. Notwithstanding his having parted with the certificate and transfer, the original transferor, who is entered as owner in the certificate and register, continues to be the only shareholder recognised by the Company as entitled to vote and draw dividends in respect of the shares, until the transferee or holder for the time being obtains registration in his own name. It would, therefore, be more accurate to say that such delivery passes, not the property of the shares, but

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a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner.

According to the custom of bankers and stockbrokers, both in this country and America, a certificate, with the indorsed transfer executed in the manner already described, is regarded as being "in order"; and its delivery, in exchange for value received, is understood to be sufficient to pass the full title of the registered owner. Even when the delivery has been fraudulent, as in the present case, the Supreme Court of New York has held that the registered owner cannot reclaim the document from a holder who has given valuable consideration, in good faith and without notice of the fraud. But it is necessary to observe that the decision of the Court did not attribute to the instrument any privilege or negotiability in the legal sense of that term. It was based (to use the language of Mr. Carter, one of the appellants' witnesses) "upon the circumstance that the registered owner has so dealt with that certificate as to lead the purchaser for value to believe that he was taking a good title to it. In other words, the foundation rests in the principle of estoppel." Thus far the principles of American appear to me to be in harmony with the principles of English law. According to the latter, the true owner of such documents of title is not held to have parted with his interest in them except where he intended to pass such interest, or where, by reason of some act or omission, he has estopped himself from saying that he did not intend to pass it.

The cases cited in the course of the argument which relate to competition between equitable and legal rights to stock or shares have really no bearing here. Whether the respondents are estopped from saying that Blakeway had not their authority to dispose of the certificates in question is, in my opinion, the sole question presented for decision in these appeals. Had the transfers been executed by John Michael Williams, and the certificates thereafter sent by him to Thomas, Sons & Co. for safe custody, I should not have hesitated to hold that Blakeway, though acting fraudulently, was nevertheless placed by his act in a position to give a title to an honest purchaser which his employer could not dispute. But that is not the case with

which we have to deal. The transfer was signed by the respondents, who were not the registered owners of the shares and were not named in the certificate. Whatever may be the effect of an instrument so executed, one thing is clear, that it cannot be regarded as, either in law or by custom, equivalent to a certificate and transfer executed by the registered owner himself.

When the executors of a registered owner find it necessary to dispose of his shares, they may for that purpose sign either the indorsed transfer or a separate transfer. But these documents themselves are insufficient to enable a person to whom the executors intend to pass the shares to obtain registration and a new certificate in his own name. In order to effect that object it must be proved to the satisfaction of the company that the persons signing the transfer as executors really possess that character, and also that their signatures to the transfer are genuine. Although registration may be obtained upon the production of such evidence, the documents are not "in order," or, in other words, are not accepted in commercial circles as sufficient vouchers of title, unless they are accompanied by an extract of the probate and an attestation of the genuineness of the executors' signatures by the United States consul or other competent officer. The evidence on this point, with reference to Stock Exchange transactions, is all one way; and it is a remarkable fact, that of five officials of London banks examined for the appellants, not one was able to speak to an instance of a transfer signed by executors having been taken as a security, except in the transactions which have given rise to the present litigation.

In these circumstances, the appellants cannot successfully maintain that they got the respondents' certificates from Blakeway in the usual course of business. They contend, however, with some degree of plausibility, that the title which they did get was in law sufficient, inasmuch as the respondents had obtained probate and had signed the transfers, and registration could have been obtained on proving these undoubted facts to the satisfaction of the company. On the other hand, the respondents argue that any attempt to put the transfers in order by procuring an attestation of their signatures would naturally

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have led to the detection of Blakeway's fraud, and that an honest endeavour to obtain evidence of genuineness would probably have led to the same result. Beyond the fact that these transactions were not in the usual course of business, I do not find it necessary to derive any inference from these considerations, because there is another aspect of the case which appears to me to be conclusive against the appellants.

When the registered shareholder executes the transfer indorsed on his certificate, he can have only one intelligible purpose in view, that of passing on his right to a transferee. It is not so in the case of an executor, whose only title to the shares is by legal assignment to the interest of the defunct. The evidence establishes that whether his intention be to dispose of the shares, or to vest himself with them, and to hold them as part of the executory estate, the usual practice is for him to sign the indorsed transfer as executor, without inserting the name of a transferee. His signature in his executorial capacity does not disclose whether he intended the one or the other of these two things; and the document, when placed by him in the hands of a broker, does not speak in terms less ambiguous. It conveys no representation to persons transacting business with the broker that he has authority to sell or pledge, or to do more than effect the substitution of the executor's name for that of the defunct in the register of shareholders. I am of opinion that an ambiguous document of that kind cannot raise an estoppel which will prevent the respondents from pleading that Blakeway had no mandate to pledge their certificates. I think the signature of the respondents, in their executorial capacity, was in itself sufficient notice to cast upon the appellants the duty of inquiring into the extent of his authority, and on that ground I concur in the judgments which have been moved by the Lord Chancellor.

LORD BRAMWELL:—

My Lords, J. M. Williams at his death was the owner, registered in the books of the company, of 1210 shares of the New York Central and Hudson River Railroad Company. On his death these shares, and his right and title thereto, devolved on his executors, the respondents. But to give them these full

rights, power of acting as shareholders and receiving dividends, it was necessary they should be registered as shareholders. They could, perhaps, without registration of themselves, though I do not think it clearly appears, nor is it material, transfer those rights by a proper instrument to others, who would then be entitled to registration. The respondents were possessed of the certificates of the testator's ownership of the shares. On these certificates was a form indorsed, which is clearly applicable to a transfer from the person or persons named in the certificates to a purchaser, and not to a transfer from a testator by his executors to themselves. However, the executors being desirous of having the shares transferred into their names that they might receive the dividends and sell the shares if they wished, and being told it was right to do so, signed these indorsements. They sent these to the testator's brokers to get them, the executors, registered as the shareholders. Instead of this being done, one of the firm of brokers pledged these certificates, part to one of the appellants, part to the other, fraudulently and in breach of his duty to the respondents.

Now, as has been said, the shares being of an American company domiciled in one of the United States of America, an act effectual by the law of that state to transfer the property, and no other, would transfer it. Now, the respondents have not, in fact or intention, transferred the shares to the appellants. But it is said they are estopped to say they are not, for they have signed the indorsed form on the certificates in blank, which, it is contended, means that any person giving value may fill up the blanks and become the owner. I cannot agree. It seems to me plainly wrong. I think anyone seeing that the shares were in the name of John Michael Williams, that the indorsements were not by him, but by two others, must have known that it might be intended, rightly or wrongly, that the shares should be sold, or that money should be borrowed on them, or that the signatures were those of persons representing Williams, and intending that the shares should be transferred into the names of the persons so signing; any one of these three intentions is possible, in fact. If so, there can be no estoppel to say the last was meant. It is not contrary to what they have

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said by their indorsement. Further, I think the circumstances are such as to have called on persons lending money on these documents to inquire as to the right of the borrower to pledge.

On these grounds, I think that the judgment should be affirmed. I cannot, with all respect to Lord Cairns, see any ground for applying the doctrine of *Pickard* v. *Sears* (1) in *Goodwin* v. *Robarts* (2). The plaintiff there was not making a claim inconsistent with anything he had theretofore said or done.

I should be sorry to think we were deciding these cases differently from what would be done in New York State. But I cannot believe we are. Though such cases did not occur at the time when New York became an English possession, yet the principles which should govern were the same then as now. It is not suggested there has been any statutory change in the state of New York, and therefore the law is the same there as here. It is admitted that if these certificates had been stolen from the executors with their names on them no title would be gained by a purchase for value. But it is said to be different because the respondents voluntarily parted with the certificates indorsed. I think that makes no difference. It could only do so by estoppel, and I think for the reasons I have given that there is none.

One word on the alleged hardship on the defendants. I think there is none. I think they ought to have inquired as to these instruments. It is said business could not be transacted if that were necessary. The same thing was said when Lord Sheffield's case was decided. But, as has been shrewdly observed, such business is as lively as ever. I repeat my remark during the argument. Shopkeepers have said, when suing a husband, that they could not possibly ask the wife if she had his authority to pledge his credit—she would be offended. An excellent reason for not asking her, but not for making him pay.

I think the judgments should be affirmed.

LORD HERSCHELL :—

My Lords, the question for determination in these appeals is, whether the appellants are entitled to certain shares in the New York Central and Hudson River Railway as against the

(1) 6 A. & E. 469. (2) 1 App. Cas. 490.

respondents. There is no doubt that the respondents, as the executors of the late John Michael Williams, were the owners of these shares in January 1881, and it is equally free from doubt that they have never done any act with the intent to sell or pledge them, or otherwise part with the property in them. If, therefore, they are no longer the owners of them, the property has passed in spite of their intention.

There are only two ways in which according to the law of England a good title can be acquired under such circumstances. If the instruments of title be negotiable instruments, a person taking them for value without notice of any infirmity in the title would have a right to hold them, even as against a prior owner who had never intended to part with the property in them. Or, again, such an owner may have so acted as to be estopped from setting up a claim as against a person who has bonâ fide and for value taken the instruments by way of sale or pledge. I do not understand these general propositions to be disputed by the appellants. But they contend that the question is not to be determined by the law of England. They insist that although all the transactions between the parties took place in this country, inasmuch as the company, the title to the shares in which is in question, is a corporation existing under and governed by the laws of the State of New York, recourse must be had to the laws of that state to determine what is necessary to pass the property in such shares, and whether under given circumstances the property in them passed, without regard to the place where the transaction took place, which is alleged to have had that result.

I agree that the question, what is necessary or effectual to transfer the shares in such a company, or to perfect the title to them, where there is or must be held to have been an intention to transfer them, must be answered by a reference to the law of the State of New York. But I think that the rights arising out of a transaction entered into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares, must be determined by the law prevailing here.

The facts in the present case lie in a narrow compass and are not in dispute. The certificates of the shares were all in the

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same form. Each of them certified that John Michael Williams was entitled to ten shares in the capital stock of the company, transferable in person or by attorney on the books of the company only on the surrender and cancellation of the certificate by an indorsement thereon and in the form and manner required by the transfer regulations of the company. The certificates were handed to Thomas & Co., a firm of stockbrokers, in order that they might procure the executors to be registered in the books of the company and thus complete their title. On the back of each of the certificates was a printed form in the following terms:—

"For value received

do hereby sell, assign, and transfer to

shares of the capital stock of the New York Central and Hudson River Railroad Company of 100 dollars each standing in name on the books of the company and represented by the within certificate and do hereby irrevocably constitute and appoint attorney to execute a surrender and cancellation of the within certificate and also to do all things requisite to transfer the said stock on the books of the said company in such form and manner as may be necessary or may be required by the regulations of the said company in that behalf with full powers of substitution in the premises."

This form was signed by the executors before the certificates were placed in the hands of Thomas & Co.; but the blanks were not filled up. A partner in the firm of Thomas & Co. afterwards delivered the certificates in the same condition to the appellant banks, as security for advances made by them. This was done without the knowledge or authority of the executors.

The evidence of eminent lawyers, well acquainted with the law of the State of New York, was adduced on behalf of the appellants. They proved that the delivery of a certificate with a transfer and power of attorney, signed in blank by the registered owner, is a good assignment of the shares, and passes a title to them both legal and equitable. The corporate body, indeed, recognizes no one as a stockholder except those who appear to be such on the books of the company. The rights to vote and to receive dividends are determinable only by reference to those books, and where the registered owner is indebted to the company for unpaid

calls or otherwise, the company would be justified in refusing to make a transfer in their books until this indebtedness was discharged. But as between the parties to the transaction the transfer is entirely completed by the delivery of the certificates in the manner mentioned. The evidence of the American lawyers, however, makes it equally clear that such certificates of shares are not in the United States, any more than in England, negotiable instruments. The mere delivery of them with the indorsed blank transfer and power of attorney signed, irrespective of any act or intent on the part of the owner of the shares, is not of itself sufficient to pass the title to them. If delivered by or with the authority of the owner with intent to transfer them, such delivery will suffice for the purpose. But if there has been no intent on the part of the owner to transfer them, a good title can only be obtained as against him if he has so acted as to preclude himself from setting up a claim to them. If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who received it in good faith and for value. And this doctrine has been held by the Court of Appeals of the State of New York to be applicable to the case of certificates of shares, with the blank transfer and power of attorney signed by the registered owner, handed by him to a broker who fraudulently or in excess of his authority sells or pledges them. The banks or other persons taking them for value, without notice, have been declared entitled to hold them as against the owner.

As at present advised I do not see any difference between the law of the State of New York and the law of England in this respect. If in the present case the transfer had been signed by the registered owner and delivered by him to the brokers, I should have come to the conclusion that the banks had obtained a good title as against him, and that he was estopped by his act from asserting any right to them. But this is not the case with which your Lordships have to deal. The transfers in this case were not signed by the registered owner, John Michael Williams, but by his executors. If they had been so signed and delivered by the executors for the purpose of effecting a transfer, I see

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no reason to doubt that such a delivery would have been effectual for that purpose. But they were not. As I have already said, the only object they had in handing them thus signed to the brokers was to complete their title by obtaining registration in their own names. And the question to be determined is whether parting with the possession of the certificates so signed was an act which estops them from setting up their title as against a person who has taken the certificates bonâ fide, and for value, from the brokers entrusted with them.

A most important piece of evidence was adduced at the trial bearing upon this point. It was proved that it was the usual course where executors desire registration in their own name to forward the certificates, with the indorsement signed by them, and acknowledged, with a duly authenticated copy of the will, to the New York office, and that on such certificates and copy will being filed new certificates in the names of the executors are returned to them. It thus appears that certificates, signed as those now in controversy were, may be in the hands of brokers for either of two purposes, to effect a transfer or to complete the title of the executors. Their possession is just as consistent with the one purpose as the other.

The case seems to me to differ essentially from that of a transfer signed by the registered owner. He must, presumably, have signed it with the intention at some time or other of effecting a transfer. No other reasonable construction can be put on his act. And if he entrusts it in that condition to a third party, I think those dealing with such third party have a right to assume that he has authority to complete a transfer. But when the indorsement is signed by executors who are not the registered owners, there can be no such presumption. They may well have signed it merely to complete their title without the intention of ever parting with the shares.

Under such circumstances, I do not think any one dealing with a broker in possession of such certificates has a right to assume that he has authority to complete a transfer of them; his possession is equally consistent with the absence of any such authority and with his holding them merely for the purpose of procuring registration in the name of the executors.

Indeed, I think the evidence shews that the latter would be the more probable explanation of the signature by the executors. For, though an attempt was made to prove that it was a common practice for executors to sign indorsed transfers for the purposes of transferring the shares on a sale or pledge, the attempt signally failed.

Under the rules of the New York Stock Exchange the delivery of certificates with the indorsement signed by the executors of the registered owner is not a good delivery. And in the New York financial market, amongst bankers and brokers, it is not usual to lend upon the security of share certificates thus signed by executors; they are not regarded as being in order. Any such transaction would be exceptional only, and depend upon confidence in, or some special arrangement with, the borrower. Nor would a transfer signed by executors be a good transfer on the London Stock Exchange. A certificate and transfer would not be accepted unless it was clear on the face of it. And it is a remarkable fact that the representatives of several of the most important banking establishments in this country who were called as witnesses were unable to point to a single instance in which certificates with indorsed transfers, signed by the executors of the registered owner, had been taken in the course of their business as security for an advance.

I have come without hesitation to the conclusion that there is no estoppel in this case as against the respondents which prevents their setting up their title to the shares and the certificates which represent them—a title which they have never intended to part with, and of which they can have been deprived, if at all, only by estoppel.

For these reasons I think the judgment appealed from should be affirmed.

LORD MORRIS:—

My Lords, I do not think it necessary to consider some nice questions which might arise under certain circumstances on the transfer by delivery and indorsement of certificates which are admittedly not negotiable instruments. In this case did the transfer and indorsement made by the executors of John Michael

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Williams transmit title to the shares to the appellants? On the facts (which it is not necessary to recapitulate) if the transfer and executorial indorsement did so vest the property it must have done so by estoppel, as well by the law of the State of New York as by the law of England.

Mr. Carter, a member of the American bar, examined on behalf of the appellants, thus states the law of New York: "The foundation of a title of a bonâ fide purchaser for value of a certificate of stock which has been delivered to him in fraud of the rights of the registered owner rests upon the circumstance that the registered owner has so dealt with that certificate as to lead the purchaser for value to believe honestly that he was taking a good title to it—in other words, the foundation rests on the principle of estoppel." Applying that principle to this case, the appellants in taking delivery of the certificates from Blakeway should have acted in such a manner as reasonable men would in dealing with such an important matter of business. They did not so act. According to the American evidence the certificates were not "in order," and would not, according to the rules of the New York Stock Exchange, pass from hand to hand. The documents were imperfect, and though in a proper case the imperfections might be remedied, that is not a sufficient answer when the appellants have to rely on title by estoppel. According to the English evidence, the certificates as indorsed would not be accepted in delivery on the London Stock Exchange. Consequently, whether considered from American usage and law or English, the documents were imperfect; the appellants were thereby put on inquiry, and being so put, can have no better title than their transferor Blakeway.

In my opinion the judgments should be affirmed.

Orders appealed from affirmed; and appeals dismissed with costs.

Lords Journals 12th May 1890.

Solicitors for appellants in the first appeal: *Druces & Attlee.*

Solicitors for respondents in both appeals: *Freshfields & Williams.*

Solicitors for appellants in the second appeal: *Young, Jones, Roberts, & Hale.*

[HOUSE OF LORDS.]

CHARLES MUIRHEAD AND OTHERS . . APPELLANTS;

AND

JAMES MUIRHEAD. . . . . RESPONDENT;

AND

J. B. CRELLIN. . . . . RESPONDENT.

H. L. (Sc.)
1890
May 12.

Succession—Period of Vesting, Acceleration of—Effect of Wife's Repudiation of her Testamentary Provisions.

By trust disposition and settlement a truster who died in 1865 directed his trustees to hold his whole estate, in order to pay his wife an annuity and to accumulate the balance of the income till her death, and "as soon after the death of my said wife as convenient" to convey specific heritable subjects to certain of his children, to realise the whole residue, and, having invested £1000 for the life-rent benefit of another child with the fee to his children, to divide the remaining residue among his four children; declaring that if any of the children "predeceased the term of payment of their provisions without leaving issue" his or her provisions under the deed "should lapse and fall into residue." The residue was to be divided in the proportion of one share to each surviving child, and one share among the children of each deceasing child.

The widow repudiated, immediately after the truster's death, her testamentary provisions, and elected to take her legal rights of terce and jus relictæ. One child died without issue in 1866. The period allowed by the Thellusson Act (39 & 40 Geo. 3, c. 98) for accumulation came to an end in 1886; and in that year one of the children and the representative of the husband of the deceased child claimed, in contradiction to the contention of the other children, that the fund in respect of the widow's repudiation had vested a morte testatoris. The widow was still alive:—

Held, reversing the decision of the Court of Session (15 Court Sess. Cas. 4th Series (Rettie), 254) that the beneficial fee of the specific heritable subjects and the residue did not vest until the death of the truster's widow, that her repudiation of her testamentary provision could not accelerate the distribution of the fund, and that until her death the beneficiaries could not be ascertained.

Lucas' Trustees v. *The Lucas Trust* (8 Court Sess. Cas. 4th Series (Rettie), 502) doubted.

Annandale v. *Macniven* (9 Court Sess. Cas. 2nd Series (Dunlop), 1201) explained.

APPEAL from interlocutors of the Second Division of the Court of Session, Scotland, affirming an interlocutor of the Lord Ordinary (Lord Fraser) in an action of multiplepoinding (1).

(1) Reported as *Latta* v. *Muirhead* (15 Court Sess. Cas. 4th Series (Rettie), 254.)

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Charles Muirhead, poulterer in Edinburgh, died on the 23rd of May 1865, leaving a trust disposition and settlement, and survived by his widow, who was still alive, and two sons, Charles the appellant, and James the respondent, and two daughters, Jessie and Agnes. The other respondent, James B. Crellin, lodged claims under the settlement and will of Jessie.

The material question was that decided by the interlocutor, given below, dated the 23rd of December, 1887, namely, whether the bequests to the children vested a morte testatoris, and whether, consequently, the rejection by the widow of (inter alia) her annuity under her husband's will operated as an acceleration so as to entitle the children or those who represented them to immediate payment.

The testator left heritage and personal estate.

The leading provisions of the settlement are stated in Lord Watson's opinion; and it is only necessary to state here shortly, that the testator directed his trustees, in the event of his wife surviving him and retaining her right to dispose of her separate estate, to pay her an annuity of £100, but in the event of her survivance and her making over her separate property within six months after his death, so that it became part of his estate, the trustees were to pay her an annuity of £250 instead of an annuity of £100, and in either case she was to have the use of his furniture and of a dwelling-house. By the 3rd clause he directed his trustees to make over his business to certain of his children. By the 4th, the trustees were to draw the revenue of all his estate not above disposed of "during the life of my said wife, and to accumulate the revenue, after paying my wife's said annuity, with the principal": then by clauses 5, 6, and 7, "As soon after the death of my said wife" as convenient certain portions of his heritable property were to be disponed, assigned, and conveyed to three out of his four children (the exception being James Muirhead); and by clause 8, "All the foregoing purposes being satisfied" the trustees were to "realise the whole residue and remainder" of his means, and out of his said residue as soon after his wife's death as convenient to invest £1000 on heritable security, and pay the interest to James Muirhead as an alimentary provision not liable to be seized by his creditors, and

upon his death it was to be paid or invested for his lawful children equally; but if at any time the circumstances of James Muirhead and his family were such as to make it advantageous to him or them to have the use of the whole or a portion of such capital sum, the trustees were to advance it. By the 9th clause the trustees were to divide the residue remaining of his estate after the investment of the £1000 for James and his issue into four equal shares, and pay over or invest the same as follows—one-fourth part to his son Charles Muirhead; one-fourth to his daughter Jessie Muirhead or Carter; one-fourth to his son James Muirhead, for his life-rent use only and to his children in fee; and one-fourth he directed his trustees to invest for behoof of or pay to his daughter Agnes Muirhead, exclusive of the jus mariti of any husband she might marry. The deed then contained this declaration: "If any of my children predecease the term of payment of their provisions under this deed, the said provisions shall lapse and become part of the residue of my estate, unless in the event of the predeceasing child or children leaving lawful issue, in which case such lawful issue shall succeed equally among them to the provisions their parent would have received had that parent survived the term of payment foresaid; and in the event of the predeceasing child dying without issue and that child's provisions becoming part of the residue of my estate, my said trustees are directed to divide the residue of my estate into as many shares as I have children surviving the term of payment, or children who, though dead, have left lawful issue, and to pay over, divide and invest the same in the proportion of one share to each surviving child, and one share to the children of each deceasing child who has left lawful issue."

The widow immediately after the death of her husband rejected the testamentary provisions in her favour and claimed her terce and jus relictæ, and she accepted payment of a sum of money in settlement of the latter, and in lieu of terce she received an annual sum of about £60, which was paid down to August, 1886, when, in consideration of a bond of annuity for £60 from her three surviving children, she gave a discharge not only of her terce but of all her claims whatsoever as the widow of the testator.

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Charles Muirhead is married and has children; so also is Agnes Muirhead—she also has issue; but James Muirhead is not married.

The testator's daughter, Jessie Muirhead, or Carter or Crellin, died on the 10th of September, 1866, without issue. On her marriage with James Crellin in January, 1866, she by antenuptial contract (inter alia) conveyed to trustees a sum of £4000, or such sum as she might be entitled to falling under the settlement of her father, and also a sum of £3000 to which she was entitled to out of the estate of the late Adam Nicols, and £1000 of her own invested in debentures. On the 2nd of July, 1866, she executed a will in favour of certain trustees, whereby she left to her husband James Crellin all her estate not previously conveyed by the marriage contract. The respondent, J. B. Crellin, the son of James Crellin by another wife, as his father's executor and representative and as an individual, made his claims in this action under that settlement and will.

In September, 1886, this action of multiplepoinding was raised by the respondent James Muirhead claiming the distribution of the estate of the testator. The action was raised in the name of Mr. Latta, S.S.C., who had been appointed judicial factor on the trust estate.

Charles Muirhead, the appellant, and his children, and in the Court of Session Agnes Muirhead or Christie and her husband for his interest, and the judicial factor, lodged separate pleadings. They contended that the provisions to the truster's children did not vest on the widow rejecting her rights under the will, but that vesting was postponed until her death, and that consequently nothing fell to be divided to the parties entitled except the accumulations of revenue since 1886 in respect of the Thellusson Act (39 & 40 Geo. 3, c. 98). The appellant Charles Muirhead and his sister Agnes had an interest in fixing the death of the truster's widow as the period of distribution, in respect that James Muirhead, who had no children, may not survive until that period, and their contention also cut out the claim of the respondent J. B. Crellin.

The respondents, on the other hand, claimed that in respect of renunciation by the widow, the children's shares were to be taken as having vested a morte testatoris.

By interlocutor dated the 10th of June, 1887, the Lord Ordinary (Lord Fraser) found (apparently on the ground that the act of the widow in repudiating her provisions, coupled with the act of law, had destroyed any object there was in keeping up the trust) that the time for putting an end to the trust had arrived, and that the living children were entitled to their shares. His Lordship, however, held that the respondent James B. Crellin, and others claiming through Jessie Muirhead, Carter or Crellin, had no claim as nothing had vested in her before her death in 1866, and therefore nothing could be transmitted by her; for to hold so would be, in his Lordship's opinion, to defeat the provision for accumulation which was quite lawful for the period of twenty-one years; and would give to the immediate children of the truster a right he did not intend them to possess, at least during that period; for he provided that in the event of their not surviving the period of distribution, their share should go to their children—a provision that would be defeated by holding that the money could be distributed immediately upon the widow's repudiation.

The respondent J. B. Crellin reclaimed to the Inner House; and on the 23rd of December, 1887, the Second Division, recalling the Lord Ordinary's judgment, held that the right to the provisions vested in the beneficiaries on the death of the testator Charles Muirhead; and with the finding that all the claimants were entitled to payment out of the fund in medio, and to the expenses incurred by them respectively as between solicitor and client, their Lordships remitted the cause to the Lord Ordinary (1).

As the following subsequent interlocutors were also appealed against, as well as both the above, these are set out.

Thereafter the marriage contract trustees of Jessie Muirhead, Carter or Crellin, who had been discharged in 1885 after the death of James Crellin and on their distributing the trust fund then in their hands, intervened; and on revised pleadings, the Lord Ordinary, on the 20th of June, 1888, pronounced an interlocutor in accordance with the finding of the Second Division; but his Lordship refused wholly the claim of the respondent James B. Crellin, in respect that the claim of the marriage contract

(1) See, for this judgment and that of the Lord Ordinary, 15 Court Sess. Cas. 4th Series (Rettie), 254 where they are set out in full.

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trustees of Mrs. Jessie Muirhead, Carter or Crellin, had been sustained.

On a reclaiming note for the appellant, Charles Muirhead and others, the Second Division, on the 6th of November, 1888, adhered to the Lord Ordinary's interlocutor, except so far as it refused in toto the claim of the respondent James B. Crellin to rank on the fund, holding that the marriage contract trustees were entitled to the provisions falling to Mrs. Crellin up to £4000 with interest from the truster's death; and that J. B. Crellin was entitled to claim the remainder of the said provisions. And that all parties were to have their expenses out of the fund.

On appeal (1).

1890. Feb. 21, 24, 25. *A. G. Murray* (of the Scotch bar) (with him, Sir *Horace Davey*, Q.C.), for the appellants.

The Court of Session considered they were bound by *Annandale* v. *Macniven* (2). If that case must be taken to have decided that a beneficiary who has not a vested interest obtains a vested interest in consequence of the renunciation by the life-renter of the provisions in his favour it is erroneous: *Pretty* v. *Newbigging* (3), where it was said that *Annandale's Case* (2) ought not to be relied on. If, on the other hand, what was decided in *Annandale's Case* (2) was that the deed gave at once a vested interest, then that case does not apply. In this will the period prescribed for the distribution of the residue and the conveyance of the various heritable properties has not yet arrived. The period of payment is found in clause 5, namely, "as soon after the death of my said wife as convenient." Everything after that is a series of continuous operations. Had the widow been content with the will there could have been no doubt that the children would have obtained no right until her death. Her repudiation could not alter that intention. The period of vesting must be

(1) The case was ordered, 6 May, 1889, by this House to be heard ex parte as to Mrs. Agnes Muirhead or Christie and her trustees; the judicial factor of the trust; the trustees of the marriage contract of Mrs. Jessie Muirhead, Carter or Crellin; and another, they not having lodged cases.

(2) 9 Court Sess. Cas. 2nd Series (Dunlop), 1201.

(3) 16 Court Sess. Cas. 2nd Series (Dunlop), 667, at p. 690.

decided by the words of the will itself, otherwise the will would be interpreted by something which occurred after it became operative. The postponement of the time of payment was not simply to secure the widow's annuity, for the evident desire of the testator was that a large fund should be accumulated until the time for distribution among the children arrived.

As to the heritage, there is no difficulty; for reading clauses 5 and 8 with the survivorship clause, where the word "payment" is used along with the word "provisions," and therefore includes everything given, it is clear that at the period of distribution, the death of the widow, the heritage remaining or which has lapsed is to be sold and turned into moveable estate, and falls into residue. [He also cited *Young* v. *Robertson* (1); *Bryson's Trustees* v. *Clark* (2); *Alexander's Trustees* v. *Waters* (3); *Ferrie* v. *Ferrie* (4); *Robertson* v. *Davidson* (5), and *Carleton* v. *Thomson* (6).]

Sir *R. Webster*, A.G. (with him, *Watt* of the Scotch bar), for the respondent James Muirhead:—

The object of the direction to accumulate was solely to secure the annuity to the wife. If she had died the clause to accumulate would have ceased to have effect; when, therefore, she repudiates the will altogether, that clause ought not to control or alter the interests of other persons. The cases of *Annandale* v. *Macniven* (7), and *Lucas' Trustees* v. *The Lucas Trust* (8) apply.

The Solicitor-General for Scotland (*Darling*, Q.C.) (with him, *Rigby*, Q.C.), for the respondent James B. Crellin:—

The repudiation of the widow is equivalent to her death, and the whole moveable and heritable subjects vest a morte testatoris. If a will contains no express postponement of vesting, the pre-

(1) 4 Macq. 314, at p. 323.
(2) 8 Court Sess. Cas. 4th Series (Rettie), 142.
(3) 8 Court Sess. Cas. 3rd Series (Macph.), 414, at p. 416.
(4) 11 Court Sess. Cas. 2nd Series (Dunlop), 704.
(5) 9 Court Sess. Cas. 2nd Series (Dunlop), 152.
(6) L. R. 1 H. L., Sc. 232; 5 Court Sess. Cas. 3rd Series (Macph.), (H.L.) 151.
(7) 9 Court Sess. Cas. 2nd Series (Dunlop), 1201.
(8) 8 Court Sess. Cas. 4th Series (Rettie), 502.

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sumption is in favour of immediate vesting. There was no doubt that the income of the trust was larger than the annuity, but not so much so as to put out of view the contingency that the income might not be more than enough. If the testator had intended to build up a family estate, he would not have left his intention to depend on his wife's life; and *Annandale* v. *Macniven* (1) instituted the principle that repudiation accelerated the period of vesting. In *L'Amy* v. *Nicolson's Trustees* (2) Lord Fullerton recognised the authority of that case. And in *Alexander's Trustees* v. *Waters* (3) Lord Cowan said, citing the Annandale case: "I think there is good reason for holding that the widow, by repudiating the trust settlement, placed the funds in the same situation as if the deed had contained no life provision in her favour, and entitled all interested to a division on the same footing as if her interest under the deed had been extinguished by her death." *Pretty* v. *Newbigging* (4) was not identical with *Annandale* v. *Macniven* (1).

The heritable subjects vested irrespective of anything the widow did; for although they were only to be conveyed at the death of the widow, they were specifically disponed. The testator, no doubt, intended them to be a fund of credit, the profit, until they fell in, going into the accumulated fund.

A. G. Murray, in reply, cited *Buchanan* v. *Angus* (5); *Urquhart* v. *Dewar* (6).

Judgment after consideration.

May 12. LORD HALSBURY, L.C.:—

My Lords, I have had an opportunity of reading in print the opinion which is about to be delivered by my noble and learned friend Lord Watson, and I can only say that I entirely concur in it, adding as my only contribution to the judgment that it

(1) 9 Court Sess. Cas. 2nd Series (Dunlop), 1201.
(2) 13 Court Sess Cas. 2nd Series (Dunlop), 240.
(3) 8 Court Sess. Cas. 3rd Series (Macph.) 414, at p. 416.
(4) 16 Court Sess. Cas. 2nd Series (Dunlop), 667.
(5) 4 Macq. 374.
(6) 6 Court Sess. Cas. 4th Series (Rettie), 1026.

seems to me to disentangle the case from the difficulties which surround it, and to give a strict but true construction to the document. On the other hand, the construction put upon it by the Court below seems to me to offend against two very familiar rules for construing instruments, inasmuch as it puts into the instrument words which are not there, and by putting those words into it robs of their proper meaning words which are there.

LORD WATSON:—

My Lords, the decision of this appeal appears to me to be entirely dependent upon the construction of the testamentary settlement in the form of a deed of trust, executed by Charles Muirhead, who died on the 23rd of May, 1865, leaving a widow, and two sons and two daughters, born of their marriage.

In order to render intelligible the observations which I have to make, it is necessary to notice the general scheme of the testator with respect to the distribution of the estate, heritable and movable, which he conveyed to his trustees.

By the first and second purposes of the trust, the deceased directed his trustees, after providing for debts and expenses, to pay to his widow a free annuity of £100, to be increased to £250, in the event of her making over her separate estate to the trustees, and so bringing it within the operation of his deed, and also to give her the life-rent occupancy of a dwelling-house.

By the third purpose he directs his business, with the goodwill and stock-in-trade, to be made over to his son Charles and his daughter Agnes in equal shares; and by the fourth purpose the trustees are directed "to draw the revenue of all my estate not above disposed of during the life of my said wife, and to accumulate the revenue, after paying my wife's said annuity, with the principal."

The provisions in favour of children, with which we are chiefly concerned in this case, are contained in the five following purposes of the trust. By the fifth, sixth, and seventh of these the trustees are directed, "as soon after the death of my said wife as convenient," to dispone and convey certain heritable subjects to each of his children, Agnes, Jessie, and Charles. By the eighth,

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they are directed to realize the residue of his means and estate remaining after fulfilment of the foregoing purposes, and to invest the sum of £1000 on heritable security, in their own names, the interest being payable as an alimentary provision to his son James during his life, and the fee divisible amongst his children on his decease. By the ninth and last purpose they are directed to divide the balance of residue, after the investment of £1000 for James and his issue, into four equal shares, and to pay one of these to each of his children, with the exception of James, whose fourth share is directed to be settled upon him in life-rent allenarly, and upon his children and their heirs in fee.

The ninth purpose is followed by two declarations expressive of the truster's will. The first of them provides that advances made by him to a child, during his lifetime, shall be counted as part of the residue, and shall be deducted from the share of such child. The second, which is of material importance in the present case, is in these terms, "and if any of my children predecease the term of payment of their provisions under this deed, the said provisions shall lapse and become part of the residue of my estate, unless in the event of the pre-deceasing child or children leaving lawful issue, in which case such lawful issue shall succeed equally among them to the provisions their parent would have received had that parent survived the term of payment foresaid; and in the event of the pre-deceasing child dying without lawful issue, and that child's provision becoming part of the residue of my estate, my said trustees are directed to divide the residue into as many shares as I have children surviving the said term of payment, or children who, though dead, have left lawful issue, and to pay over, divide, and invest the same in the proportion of one share to each surviving child, and one share to the children of each deceasing child who has left lawful issue."

After her husband's death, the widow, who is still alive, elected to take her legal rights of terce and jus relictæ, instead of her provisions under the settlement; so that her annuity, which was made a first charge on the income of the trust, never became payable. One of the children, Jessie, died without issue in 1866, when any interest which she might have in the trust-estate was transmitted, by deed, to her husband, James Crellin, and has now

passed to his representatives. The other children are still in life, two of them, Charles and Agnes, having issue, whilst James is still unmarried. The administration of the trust has, for many years, been carried on by a judicial factor, who has accumulated the revenue, from year to year, in accordance with the directions of the fourth purpose. The provisions of the Thellusson Act apply to accumulations of revenue after the 23rd of May, 1886, being twenty-one years from the death of the testator.

In September, 1886, the action of multiplepoinding, in which this appeal is taken, was raised by James Muirhead, in name of the judicial factor, in order to have the corpus of the trust-estate distributed among the beneficiaries, according to their several interests. A formal defence was lodged by the factor, to the effect that the period for distribution had not yet arrived. On the various parties interested compearing as claimants, James, and the representatives of Mr. Crellin, as in right of the deceased Jessie Muirhead, insisted for immediate division, whilst Charles and Agnes, and their children, maintained that there could be no division, in terms of the trust-deed, until the death of the truster's widow.

The Lord Ordinary (the late Lord Fraser) (1) sustained the action, on the ground that the provisions in favour of children and their issue vested, on the lapse of twenty-one years from the testator's death, when the direction to accumulate became inoperative. The Second Division of the Court varied his judgment by finding "that the right to the provisions made by the truster, Charles Muirhead, in his trust-disposition and settlement, vested in the beneficiaries on his death." The only effect of the variation upon the rights of parties, was to give a vested interest to the deceased Jessie Muirhead or Crellin, which had been excluded by the finding of the Lord Ordinary.

The respondents' counsel did not argue that the Thellusson Act, in putting a stop to accumulations after the 23rd of May, 1886, could possibly affect either the time of vesting of the fee, or the period of distribution appointed by the testator in his deed. Such a proposition is plainly untenable. Nor did they argue that, if the widow had accepted her conventional provi-

(1) 15 Court Sess Cas. 4th Series (Rettie), 254.

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sions, and had been in the regular receipt of her annuity from the trust, there could have been any division of the corpus until her death. But they did maintain that the necessary effect of her renunciation was to accelerate the time of distribution, and also to accelerate the vesting of the fee.

I see no reason to doubt that, in cases where the final distribution of a trust estate is directed to be made on the death of an annuitant, and it clearly appears that, in postponing the time of division, the testator had no other object in view than to secure payment of the annuity, it may be within the power of the Court, upon the discharge or renunciation of the annuitant's right, to ordain an immediate division. But, in order to the due exercise of that power, it is, in my opinion, essential that the beneficiaries to whom the trustees are directed to pay or convey shall have a vested and indefeasible interest in their provisions. That principle appears to me to be just in itself, and to be firmly established by *Roberston* v. *Davidson* (1), *Rainsford* v. *Maxwell* (2), and *Pretty* v. *Newbigging* (3). I cannot conceive that it should be in the power of any Court to give the testator's estate to persons other than those whom he has appointed to take. It may also be that, in the circumstances supposed, the Court would be justified in directing distribution, although no beneficial interest had vested, if application were made to that effect by the entire class of persons to whom, or to one or more of whom, the beneficial interest must eventually belong; but no such case is presented in this appeal.

It appears to me that, apart from other considerations, an insuperable bar to the Respondents' demand for present distribution is to be found in the fact that the testator has given a positive direction that accumulation of revenue shall be continued until the death of his widow. They endeavoured to meet that obvious difficulty by arguing that the accumulation was intended to secure his widow's annuity, and was not meant to serve any other purpose; but the direction is express and unqualified, and neither the context of the deed, nor the circumstances of the

(1) 9 Court Sess. Cas. 2nd Series (Dunlop), 152.

(2) 14 Court Sess. Cas. 2nd Series (Dunlop), 450.

(3) 16 Court Sess. Cas. 2nd Series (Dunlop), 667.

trust, lend probability to the argument. In none of the authorities relied on by the respondents did a similar speciality occur, except in *Lucas' Trustees* v. *The Lucas Trust* (1), which was decided by the Second Division in 1881. In that case the truster, in the event, which occurred, of his pre-deceasing his wife without leaving issue of his body, directed his trustees to pay an annuity of £200 to his widow, and also to give her the life-rent of a house, and, after satisfying these purposes, to accumulate the surplus income during her lifetime. In the same event he directed them, on the decease of his wife, and after providing for payment of certain legacies, and an annuity of £100 to a brother-in-law, to make over the residue to persons named by him, as trustees of a charitable fund, to be called the Lucas Trust. The widow repudiated the trust, and claimed and got her legal rights. In these circumstances, upon a special case submitted by the trustees of the will, and of the Lucas Trust, the Court found that the former were not bound to retain the residue and accumulate the balance of income until the widow's death, and that the latter were entitled to an immediate conveyance of the residue, subject to existing and contingent interests. The case differs from the present in this important respect, that the trustees of the charity, and they alone, were entitled to the estate and its accumulations; so that the transfer to them could not prejudice the interest of any beneficiary. But it was the plainly expressed intention of the testator that the residue, increased by accumulations until his widow's decease, and no lesser amount, should be employed in launching his charitable scheme; and I entertain a doubt whether the Court was justified in giving the estate to the administrators of the Lucas Trust, without imposing upon them the duty of accumulation as directed by the truster.

Had the testator's widow not repudiated the provisions made for her in his settlement, I think it is not doubtful that the vesting of the fee would have been suspended until her decease. There are three considerations, the concurrence of which, in my opinion, necessarily leads to that conclusion: (1) the bequests to children and their issue are not conceived in the form of a separate gift, with a subsequent direction as to the time of

(1) 8 Court Sess. Cas. 4th Series (Rettie), 502.

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payment, but are, for the first time, implied in the direction to pay on their mother's death; (2) there is a gift-over to their respective issue in the event of any of the testator's children predeceasing that date; and (3) there is a clause of survivorship, which, in the event of any child and his or her issue failing before the widow's death, gives their provisions to surviving children of the testator and the issue of predeceasers equally among them per stirpes. That such would have been the import and effect of the deed if the course of trust administration had not been disturbed by the widow's betaking herself to her legal rights, was hardly contested by the respondents. They based their claim upon the fact of the widow's repudiation of the settlement, and maintained that its legal effect was to substitute the time of the testator's death for that of his widow's decease, with respect to the vesting and distribution of his estate; and they relied upon *Annandale* v. *Macniven* (1) as establishing that proposition.

It is impossible to ascertain, except by inference or speculation, the grounds of decision in *Annandale* v. *Macniven* (1), owing to the brevity of the judgments as reported. The facts of the case were, that a testator gave his widow a life rent of the trust estate, to be restricted to an annuity of £50 on her re-marriage, the fee to be assigned to his lawful children, or their issue, *on the death or second marriage of their mother.* Failing children and their issue, the trustees were directed, *on the death of the widow,* to make over the estate to the testator's brothers and sisters, equally among them, subject to a declaration that, in the event of any of them dying before their shares became payable, such shares should accrue to the survivors, or to the issue of the person dying, if any. On the death of the truster, the widow successfully claimed her legal rights, and thereafter re-married. The truster was survived by one child, a daughter, who died in minority, before her mother's second marriage. Shortly after that marriage, immediate division of the residue was claimed by brothers and sisters of the truster, under the ultimate destination, and their claim was sustained by the Court. The next of kin of the daughter also claimed the whole residue, on the footing that she took a vested interest

(1) 9 Court Sess. Cas. 2nd Series (Dunlop), 1201.

under the trust deed a morte testatoris, and they alternatively claimed her legitim, not under but as against the trust. The Court gave effect to their alternative claim. It is clear that the decision did not go upon the ground that the widow's repudiation occasioned vesting a morte, as the learned judges have held in the present case; because, in that event, the whole estate would necessarily have vested in the testator's daughter on her survivance of him, and would have passed to her legal heirs. I am strongly impressed with the belief that, in *Annandale* v. *Macniven* (1) the Court must have proceeded on the theory that, notwithstanding the difference of expression in the two cases, the testator really intended that the event upon which the ultimate fiars were to take should be the same as that upon which vesting in the persons first instituted was made to depend, viz., *the death or second marriage of his widow.* I am at a loss, on any other theory, to conjecture at what punctum temporis they held that a beneficial interest in the fee became vested.

Counsel for the respondents argued strenuously that the present case fell within the principle of *Annandale* v. *Macniven* (1); but when pressed by some of your Lordships to explain what that principle was, they were unable to give a satisfactory or definite answer. In the Court below, the Lord Justice Clerk, (Moncreiff), referring to the period of vesting which was fixed by the Lord Ordinary on the authority of *Annandale's Case* (1), said: "I have come to be of opinion that that is not the true operation of the principle, but that if the repudiation is to be equivalent to the death of the widow in the sense of the will, that principle must have its full effect, and that the provisions must be held to have vested a morte testatoris" (2).

The same rule was suggested by Lord Jeffrey in *Robertson* v. *Davidson* (3), who there said: "Does not that act of renunciation, while it frees the fee from the burden of the life rent, at the same time vest that fee, on the supposition that it was not vested before?" (4) But the principle thus suggested was rejected in that

(1) 9 Court Sess. Cas. 2nd Series (Dunlop), 1201.

(2) 15 Court Sess. Cas. 4th Series (Rettie), at p. 258.

(3) 9 Court Sess. Cas. 2nd Series (Dunlop,) 152.

(4) 9 Court Sess. Cas. 2nd Series (Dunlop), at p. 162.

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case by the Lord President (Boyle), who differed, and it was not accepted either by Lord Mackenzie or by Lord Fullerton, who agreed in result with Lord Jeffrey; the members of the Court being the same who, seven months afterwards, gave an unanimous judgment in *Annandale* v. *Macniven* (1). The next enunciation of the principle which I have been able to trace is in Lord Murray's judgment in *Pretty* v. *Newbigging* (2), in which his Lordship states that in the case of Annandale "the Court held that all were entitled to an immediate division, in the same manner as if the liferent had been extinguished by the widow's death." I have already pointed out that, if that be taken as a correct representation of what was decided in *Annandale's Case* (1), the Court plainly erred in the application of the principle, and awarded the estate to the wrong persons. But it is, in my opinion, a hopeless endeavour to extract a general and ruling principle from a case which was decided on special and exceptional grounds. According to the report in the *Jurist* (3), the Lord President, at the close of the case, made the significant announcement, "I wish it to be understood that our judgment proceeds entirely upon the terms of this particular deed."

In my opinion it is impossible to hold, as matter of principle, that the act of any person outside of, and hostile to, the trust can per se effect an alteration of the truster's dispositions with respect to the vesting of interests in his estate. Such an act may be of material importance if the testator has, either expressly or by implication, signified his intention that upon its occurrence the period of vesting shall shift. But in this case I am unable to discover, within the four corners of the trust deed, any indication whatever that its maker intended, in the event of his wife repudiating (which is the same thing as renouncing) its provisions, to appoint the period of vesting to be other than that expressly directed by him in the case of her approbation, viz., the time of her decease. The ingenious arguments of the respondents' counsel on this point appeared to me to go no farther than to

(1) 9 Court Sess. Cas. 2nd Series (Dunlop), 1201.

(2) 16 Court Sess. Cas. 2nd Series (Dunlop), at p. 682.

(3) 19 Scotch Jurist, 530.

suggest that, if the testator had anticipated the action which his wife took after his death, he might possibly have made a different arrangement in regard to the time for the fee becoming vested.

The respondents made a separate point upon the terms of the second declaration, to the effect that the words "payment of their provisions under this deed" could not apply to the heritable subjects destined in the fifth, sixth, and seventh purposes of the deed. The result would be to exempt the destinations of these subjects, which are to individuals named, from the conditions of gift-over and survivorship introduced by the second declaration, and to make the right to the subjects vest at the testator's decease. It is unnecessary to say more upon the point than this, that it is concluded against the respondents by the judgment of the House in *Buchanan* v. *Angus* (1).

For these reasons I am of opinion that the beneficial fee of the specific heritable subjects and residue, which the Court below have ordered to be divided now, will not vest until the death of the testator's widow; and that the fiars cannot be ascertained until that event takes place. I think this is a proper case for allowing the costs of the litigation to come out of the trust estate, and I therefore move that the interlocutors appealed from be reversed, except in so far as they relate to the expenses of process incurred by the parties in the Court below; and that the cause be remitted, with instructions to sustain the action of multiplepoinding in so far as it relates to accumulations of trust income accruing after the 23rd of May, 1886, and, quoad ultra, to dismiss the same.

LORD BRAMWELL:—

My Lords, I understand, from the opinion just expressed by my noble and learned friend, and, indeed, from the arguments on both sides, that the decision of this case does not depend on any peculiarity of Scotch law, but is "entirely dependent upon the construction of the testamentary instrument executed by Charles Muirhead," the rules for which are the same in Scotland as in

(1) 4 Macq. 374.

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England. That being so, I have no difficulty in saying that, in my opinion, the judgment must be reversed.

What the Court of Session has done is to read the instrument as though it contained these words: "If my wife elects to take her legal rights of terce and jus relictæ, then I direct that, instead of as soon after the death of my wife as convenient, they do, as soon after my death as convenient, divide the residue into four equal parts, and pay one part to each of my children, Agnes, Jessie, and Charles, and that there be no accumulations." Now an addition to, or abstraction from, or alteration of, a written instrument ought never to be made without almost a necessity for so doing; never, except to avoid some absurdity or repugnance. Is there any such necessity here? Certainly not. The way to test that is to see whether there would be any difficulty in reading into the will the negative of what the Court of Session has read in it. Thus, "and though my wife should elect to take her legal rights of terce and jus relictæ, still I direct that the property shall accumulate, and not be divisible till her death, and then to those as I have directed." This is what he does say when he makes the provision he has made with no qualification.

I can understand that when the person to take at one time is fixed at an earlier time, and there is no possibility of anyone else being entitled, and nothing to be done in the interim, the fund or property may be handed over at the earlier time. I should have thought, but, subject to the remark as to the accumulation of the fund by my noble friends, that *Lucas' Trustees* v. *The Lucas Trust* (1) was an example. There the trust was inevitably to take. Nothing was to be done or happen meanwhile but the accumulating of the fund. This could be caused by the trust as well as by the truster's trustees; or if they at once used the trust funds without accumulation there would be no one to complain. Perhaps that might be done in England without the intervention of a Court of Law on that ground, viz., that no one could complain. Perhaps the accumulation ought to go on for the appointed time. Perhaps that might be compelled. I am of opinion that the judgment should be reversed.

(1) 8 Court Sess. Cas. 4th Series (Rettie), 502.

LORD HERSCHELL:—

My Lords, the majority of the learned judges in the Court of Session appear to have felt themselves with some reluctance constrained to arrive at the decision under appeal by the pressure of prior authorities. If I thought that the case was governed by a consistent series of decisions, I should hesitate to disturb them, even though they might be open to review in your Lordships' House. But it appears to me clear that the construction of the particular trust disposition must be determined before it can be ascertained whether the decisions relied on are applicable to it. The Lord Justice Clerk, who delivered the leading judgment, states the principle thus: "Where provisions are made for a wife and the term of payment of the children's provisions is postponed till her death, her repudiation of these provisions and betaking herself to her legal rights will operate as her death if the postponement is substantially intended solely for the benefit of the wife." It is obvious, therefore, that the first question to be answered is, whether, upon the true construction of the instrument we have to consider, the postponement of the vesting was "substantially intended solely for the benefit of the wife." The testator directed all the revenue of his estate not disposed of during the life of his wife to be accumulated. And bearing this in mind, and looking at all the terms of the disposition, I can find nothing to justify the conclusion that the postponement was intended solely for her benefit. I am, indeed, led to the contrary conclusion. The only case cited in which it was held that the repudiation of the wife warranted an immediate distribution, where there was a similar trust to accumulate, is that of *Lucas' Trustees* v. *The Lucas Trust* (1). No reasons were assigned by the learned judges who decided that case. And I have some difficulty in understanding how they arrived at the conclusion to which they gave effect. I should have thought that the testator intended that the endowment to be handed over to the charity should be increased by the accumulation which he directed. But however that may be, I do not think the judgment in *Lucas' Case* (1) can be held to govern that now before your Lordships if

(1) 8 Court Sess. Cas. 4th Series (Rettie), 502.

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the construction which I put upon Mr. Muirhead's disposition be the correct one. These considerations appear to me to be sufficient to dispose of the present appeal. But I must not be understood as expressing any dissent from the opinion of my noble and learned friend, Lord Watson, that the act of a person outside of and hostile to the trust cannot per se effect an alteration of the truster's dispositions with respect to the vesting of interests in his estate. I agree with him in thinking that there is no indication in the trust deed that the testator intended, in the event of his wife repudiating its provisions, to appoint the period of vesting to be other than that expressly directed. And it would certainly be strange if, in the absence of such indication, the act of a third person could thus affect the position and unequivocal directions contained in the instrument.

On the subordinate question, whether, apart from the point I have already discussed, the right to the heritable subjects directed by the fifth, sixth, and seventh dispositions to be specifically conveyed to certain of his children vested at the testator's decease, or whether such vesting was postponed, and the conditions of gift over and survivorship were applicable to these subjects, I have nothing to add to what has been said by Lord Watson.

Ordered and Adjudged, that the said interlocutors (all of the above) complained of in the said appeal be reversed, except in so far as they relate to the expenses of process incurred by the parties in the Court below: Further ordered, that the cause be remitted back to the Second Division of the Court of Session, with instructions to sustain the action of multiplepoinding and proceed therein in so far as it relates to accumulations of trust income accrued and to accrue after the 23rd of May, 1886, *to decern against the said judicial factor for payment out of the capital of the estate in his hands of the foresaid expenses as and when the same may be taxed, and, quoad ultra, to dismiss the action: And it is further ordered, that the costs incurred by the said appellants, and by the said*

respondents, James Muirhead and James Basil Crellin, in respect to the said appeal to this House, be paid out of the trust estate, the amount of such costs to be certified by the Clerk of the Parliaments.

Lords' Journals, 12th May, 1890.

Agents for the appellants: *Murray, Hutchins & Co., for E. A. & F. Hunter & Co., W.S., Edinburgh.*

Agent for the respondent James Muirhead: *Andrew Beveridge, for Robert Denholm, S.S.C., Edinburgh.*

Agents for the respondent J. B. Crellin: *Burton, Yeates, Hart & Burton; Macandrew, Wright & Murray, W.S., Edinburgh; and Tyrer, Kenion, Tyrer, & Simpson, Liverpool.*

[HOUSE OF LORDS.]

SAMPSON MORRIS, AND ANN (HIS WIFE) (PAUPERS) . . . . . } APPELLANTS;

AND

JOHN EDWARDS . . . . . RESPONDENT.

Practice—Discovery—Documents of Title—Privilege—Affidavit of Documents—Interrogatories in Cross-examination—Contentious Affidavit.

The defendant in an action for recovery of land having made an affidavit of documents, which stated that he had in his possession certain documents numbered and tied up in a bundle marked with the letter A, and that he objected to produce such documents on the ground that they related solely to his own title, and did not in any way tend to prove or support the title of the plaintiffs, the plaintiffs administered interrogatories to the defendant, asking whether such documents did not include a will mentioned in the statement of claim and relied upon by the plaintiffs in support of their title, and whether the defendant had ever seen the will, and, if so, when last and where. The defendant objected to answer the interrogatories. The plaintiffs thereupon applied for an order that the defendant should further answer, and at the hearing sought to make use of an affidavit in contradiction of defendant's affidavit of documents:—

Held, that the affidavit of documents was sufficient, and need not allege that the documents did not impeach the defence; that a contentious

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affidavit was not admissible to contradict the defendant's affidavit of documents, and that the plaintiffs were not entitled to a further answer.

The decision of the Court of Appeal (23 Q. B. D. 287) affirmed.

APPEAL from an order of the Court of Appeal (1).

The action was brought in 1889 by the appellants against the respondent to recover land. The statement of claim (omitting immaterial parts) alleged that Powell, owner of freehold property, who died in 1843, devised it to a tenant for life, and after her death to the plaintiff Ann Morris: that the tenant for life entered and afterwards sold her interest in the property to the defendant: that the tenant for life died in 1880: that the defendant was in possession and held the title deeds and Powell's will. The plaintiffs claimed possession of the land and mesne profits, and a declaration that the plaintiffs were entitled to the fee simple and possession, and to have the title deeds and will delivered up to them. The statement of defence alleged that the defendant was in possession, and that the claim was barred by the Statute of Limitations.

The plaintiffs having obtained an order for discovery, the defendant made an affidavit of documents, in which he alleged (inter alia) that he objected to produce the documents set forth in the first part of the 2nd Schedule thereto on the ground that they related solely to his own title to the freehold property in the statement of claim mentioned, and did not in any way tend to prove or to support the title of the plaintiffs or either of them. The first part of the 2nd Schedule described the documents thus: "Certain deeds and documents of title numbered 1 to 8, and tied up in a bundle marked with the letter A."

The plaintiffs having obtained leave to interrogate administered interrogatories, asking 1st whether the deeds and documents of title numbered 1 to 8, and tied up in a bundle marked with the letter A, included the will of Powell, deceased, of etc., or any copy thereof, extract therefrom or recital thereof; 2ndly, whether the defendant had ever seen, and if so when last and where, any such will or any copy thereof, extract therefrom or recital thereof. The defendant objected to answer the interrogatories on the ground that they inquired as to written documents,

(1) 23 Q. B. D. 287.

and that he had already made an affidavit of documents, and alleged that all the documents which he had in his possession related solely to his own title to the freehold property and might be used by him in evidence, and did not in any way tend to prove or to support the title of the plaintiffs or either of them.

Upon a summons taken out by the plaintiffs the Master at Chambers ordered the defendant to file a further and better answer, and this order was affirmed by Wills J. at Chambers and by the Queen's Bench Division (Denman and Charles JJ.) The Court of Appeal (Lord Esher M.R., Cotton and Lindley LJJ.) reversed these decisions, holding that the defendant need not answer further (1).

In the Court of Appeal and in this House the plaintiffs' counsel sought to read an affidavit made on behalf of the plaintiffs as to the contents of Powell's will, which the Court and this House refused to admit.

July 3. *Reginald Brown* for the appellants:—

The order asked for is within the discretion of the Court to grant. An affidavit of documents made by a defendant in an action to recover land must contain three allegations: first, that the documents for which he claims privilege relate solely to his own title; secondly, that they do not support the plaintiff's title; and thirdly, that they do not impeach the defendant's title: the authority for the last proposition being *Attorney-General* v. *Emerson* (2), citing *Combe* v. *Corporation of London* (3). There the expression was "impeach his defence;" but there is no distinction in the present case; if the defence is impeached the title is, the title turning entirely upon the will. The defendant's affidavit does not say that the documents do not impeach his title, and is therefore insufficient. Again it is insufficient in describing the documents as "numbered 1 to 8 and tied up in a bundle marked with the letter A." From such a description it is impossible for the Court to pick out any one or more documents as to which a further answer ought to be given. *Taylor* v. *Batten* (4) and *Bewicke* v. *Graham* (5) are wrong and ought not to be followed.

(1) 23 Q. B. D. 287.
(2) 10 Q. B. D. 191.
(3) 1 Y. & C. Ch. 631, 651.
(4) 4 Q. B. D. 85.
(5) 7 Q. B. D. 400.

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[LORD HERSCHELL:—A similar affidavit was sworn in *Emmerson* v. *Ind, Coope & Co.* (1) "as to the documents numbered 1 to 4 both inclusive," and the Court of Appeal held that it was sufficient, though it was not sworn that the documents contained nothing to impeach the defence.]

Jones v. *Monte Video Gas Company* (2) is a distinct authority of the Court of Appeal that such an affidavit as the present is not necessarily conclusive, and that in some cases a further affidavit may be ordered, and the Court there pointed out there where a further affidavit cannot be required interrogatories may be administered. Here the plaintiffs ask, not a further affidavit but an answer to interrogatories. That was not a case of title deeds, but there is no difference between discovery of title deeds and discovery of other documents: *Lyell* v. *Kennedy* (3). *Hall* v. *Truman, Hanbury & Co.* (4) is an authority that the Court has a discretion to allow interrogatories as to some specific document or documents. The only question therefore is whether the present is a proper case for the exercise of that discretion. The Master, the Judge at Chambers and the Divisional Court thought it was, and their discretionary judgment should not be lightly set aside. It is not enough for an illiterate man to swear that his documents do not support the plaintiffs' title; it may depend on a difficult question of law. The plaintiffs want to see the will and judge for themselves whether it created a tenancy for life or in fee. In the Court of Appeal an affidavit was tendered in support of the plaintiffs' application, and it is now tendered to this House. The Court of Appeal refused to allow it to be read on the ground that a contentious affidavit was not admissible, although it was not known whether it was contentious.

[Their Lordships declined to receive the affidavit.]

At all events, the second interrogatory ought to be answered, not being open to the objection that it is cross-examination. The defendant may have seen the will in some one's possession. Unless this interrogatory is answered the plaintiffs will be in great difficulty at the trial as to what witness to subpœna and as to giving secondary evidence of the contents of the will.

(1) 33 Ch. D. 323, 329.
(2) 5 Q. B. D. 556, 558, 559.
(3) 8 App. Cas. 217.
(4) 29 Ch. D. 307.

Bosanquet Q.C. and *Weyman* for the respondents were not heard.

LORD HALSBURY, L.C.:—

My Lords, I think the recognised practice of the Courts is decisive of this case.

The affidavit appears to be as plain as anything can be: "I object to produce the said documents set forth in the first part of the second schedule hereto, on the ground that they relate solely to my own title to the freehold property in the statement of claim mentioned, and do not in any way tend to prove or to support the title of the plaintiffs or either of them." It appears to me that it is absolutely hopeless to contend that there is any authority for going behind that statement. The truth is that when one comes to see what is in Mr. Brown's mind all through, he will not accept that statement as true, but wants to contradict it, and to shew that it is untrue, and that the will upon which he relies is in truth in a certain bundle, and that the man has drawn a false inference from the provisions of the will, and that he is entitled therefore to have a look at the will (because that would be the next step) to see whether he is right or not. My Lords, it is sufficient to say that that is contrary to all the authorities, and if such an interrogatory were permitted in such a case it would be absolutely destructive of anything like privilege of documents, because in every case you might controvert an affidavit and have an interrogatory as to whether or not the documents might be seen, and the "privilege" would then be absolutely nugatory; the effect of it would be gone.

My Lords, for that plain and simple reason the Courts have always refused to enter into an inquiry of that sort. I am quite satisfied with the reasons of the learned Judges in the Court of Appeal, and I move your Lordships that this appeal be dismissed.

LORD HERSCHELL:—

My Lords, I am entirely of the same opinion. The plaintiffs in this action having sought an affidavit with regard to documents in

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the possession of the defendant and having obtained a statement that he has certain documents in his possession desire to put interrogatories to him upon them. The defendant, in relation to those documents, has stated on oath that they "do not in any way tend to prove or to support the title" of the plaintiffs and that they are deeds relating solely to his own title.

The first objection taken by Mr. Brown is that the answer is insufficient, inasmuch as it does not contain the further statement that the deeds and documents do not tend to impeach the defendant's own title. He has produced no authority to shew that any such statement is necessary. It is true that in the case of the *Attorney-General* v. *Emerson* (1) Baggallay, L.J., quoted the statement by Knight-Bruce, L.J., in *Combe* v. *Corporation of London* (2), of the allegations sufficient to support the claim to protection amongst which was the allegation that the documents did not contain anything impeaching the defence. But, my Lords, I do not understand it to have been there laid down in terms that it was essential that those words should appear in the answer in addition to such words as are to be found in the present case. In the case of *Emmerson* v. *Ind, Coope & Co.* (3) the words were similar to those which are used in the present case, and they were held in the Court of Appeal to be sufficient. It appears to me therefore that primâ facie this answer, according to the authorities, is absolutely sufficient.

But then Mr. Brown insists that although cross-examination upon such an affidavit is not permissible there may be cases in which an interrogatory relating to a particular document might be allowed, and he relies upon expressions used in *Hall* v. *Truman, Hanbury & Co.* (4) in the Court of Appeal to shew that that is so. I doubt whether he does not seek to attribute too much weight to those expressions of opinion. They seem to me to have been used in the case in question only to guard the learned judges who were there delivering judgment from being supposed to indicate that there never could be any case or any circumstances in which such a question might be admissible—I do not think they amounted to more than that.

(1) 10 Q. B. D. 191, 197, 198.
(2) 1 Y. & C. Ch. 631, 651.
(3) 33 Ch. D. 323, 329.
(4) 29 Ch. D 307.

But assuming that there may be cases in which an interrogatory directed to a particular document would be admissible, there must be some special ground or reason shewn why in the particular case the interrogatory ought to be permitted. In the present case I am at a loss to see any ground whatever for it. Therefore I concur in the judgment which my noble and learned friend has moved.

LORD MACNAGHTEN:—

My Lords, I entirely agree, and I do not desire to add anything.

LORD MORRIS:—

My Lords, I also concur.

LORD FIELD:—

My Lords, I concur. I have nothing whatever to add to the observations made by my noble and learned friends.

Order appealed from affirmed, and appeal dismissed.

Lords' Journals 3rd July 1890.

Solicitors for appellants: *Turner & Hacon for C. B. Cottam, Cleobury Mortimer.*

Solicitors for respondent: *Chester & Co. for Weyman & Weyman, Ludlow.*

[HOUSE OF LORDS.]

H. L. (E.) 1890 July 3.

PERRY DAVIS & SON . . . . . APPELLANTS;

AND

LANCASTER HARBORD . . . . . RESPONDENT.

Trade-mark—Registration—Special and distinctive Words used as a Trade-mark before the passing of the Act of 1875—*Words descriptive of Article—Words used in conjunction with other Words—Trade Marks Registration Act* 1875 (38 & 39 *Vict. c.* 91) *s.* 10.

To entitle "any special and distinctive word or words" to be registered as a trade-mark under the Trade Marks Registration Act 1875 s. 10, they must have been used alone as a trade-mark before the passing of the Act and not merely in combination with other words.

Before the passing of the Trade Marks Registration Act 1875 the appellants used the words "Perry Davis' Vegetable Pain Killer" as their trade-mark for a medicine manufactured and sold by them. After the passing of the Act they registered the words "Pain Killer" as their trade-mark under sect. 10. Upon a motion to amend the register:—

Held, affirming the decision of the Court of Appeal, that the entry must be removed from the register, the words "Pain Killer" not having been used alone before the passing of the Act:—

Held also by Lord Halsbury L.C. and Lord Morris that the words "Pain Killer" were not special and distinctive words within the meaning of sect. 10, there being nothing to distinguish goods manufactured by the appellants from goods manufactured by other persons.

APPEAL from an order of the Court of Appeal.

Early in 1877 the appellants registered under the Trade Marks Registration Act 1875 the words "Pain Killer" as their trade-mark in Class 3 in respect of patent medicines. In 1887 the respondent moved under the Patents, Designs, and Trade Marks Act 1883 to amend the register by removing therefrom the entry of the words "Pain Killer" as a trade-mark. At the hearing before Kay J. evidence was given which the appellants contended shewed that the words "Pain Killer" had been used alone as their trade-mark before the passing of the Act of 1875; but both Kay J. and the Court of Appeal, and their Lordships in this House, all held that those words had not been used alone. In fact, on the bottles in which the medicine was sold

the words used were, "Perry Davis' Vegetable Pain Killer." On this ground Kay J. following the opinions expressed in *In re Palmer's Trade Mark* (1) and *In re Leonard & Ellis' Trade Mark* (2) ordered the register to be rectified by removing the entry in question. This decision was affirmed on the same ground by the Court of Appeal (Cotton, Fry and Lopes L.JJ.). Fry and Lopes L.JJ. also expressed the opinion that the words "Pain Killer" were not "special and distinctive."

Against this decision the present appeal was brought.

July 1, 3. *Millar* Q.C. and *A. R. Whiteway* for the appellants:—

The trade-mark in question has existed for a great many years, and was upheld in Canada in 1867 and in America in 1850. In *Davis* v. *Kennedy* (3) the Canadian Court of Chancery upheld the appellants' right to restrain the then defendant from infringing the appellants' trade-mark in the words "Pain Killer," a "quaint and fancy name." A similar decision was arrived at in the Rhode Island Supreme Court in *Davis* v. *Kendall* (4). The onus is on the applicant who attempts to disturb so old a trade-mark, and which has been on the register for eight years. Those decisions no doubt turned on the common law right, while the question here depends on sect. 10 of the Trade Marks Registration Act 1875. The trade-mark "Pain Killer" fulfils all the requisites of that section. First, they are "special and distinctive" words: they are not descriptive, but designate a medicine never before invented, or published. No one else had combined the two words before for such a purpose. They constitute a fancy and distinctive name.

Secondly, if it be necessary that the words should have been used alone before the passing of the Act of 1875, there is evidence to that effect. But it is not necessary. The Act does not say it is, and there are only two authorities to the effect that it is necessary: namely, *In re Palmer's Trade Mark* (5), and the opinion of Lord Selborne in *In re Leonard & Ellis' Trade Mark* (2).

(1) 24 Ch. D. 504.
(2) 26 Ch. D. 288, 295.
(3) 13 Grant, Upper Canada Ch. 523.
(4) Cited in Sebastian's Digest, No. 103.
(5) 24 Ch. D. 504, 518.

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The first case differs from the present in that scrolls were used there, while here there are none: and that the words there, "braided fixed stars," were not invented by the persons claiming registration. In the latter of the two cases Lord Selborne's observations on this point were obiter dicta. Those two authorities stand alone, and if undistinguishable from the present case should be overruled.

[They also referred to *Orr-Ewing* v. *Registrar of Trade Marks* (1).]

Beale Q.C. and *Chadwyck Healey* for the respondent were not heard.

LORD HALSBURY L.C.:—

My Lords, in this case, notwithstanding the somewhat extended period over which the argument has gone, it seems to me the decision cannot be doubtful, and the point on which the whole question must turn is a very short one. I had certainly imagined that since those authorities, to which attention has been drawn, there had never been any doubt raised as to the true construction of the 10th section of the Trade Marks Act of 1875. Apart from authority I should have had no difficulty at all in giving the same construction to the language of that section. For the purposes of that Act a trade-mark has to consist "of one or more of the following essential particulars; that is to say, a name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or a written signature or copy of a written signature of an individual or firm; or a distinctive device, mark, heading, label or ticket; and there may be added to any one or more of the said particulars any letters, words or figures, or combination of letters, words or figures."

Then comes the matter with which we have to deal headed by "also," "any special and distinctive word or words or combination of figures or letters used as a trade-mark before the passing of this Act may be registered as such under this Act." It appears to me that on the plainest possible principles of construction the decision arrived at by Lord Justice Cotton at all events, I think by the whole Court, affirmed afterwards by Lord Selborne, was

(1) 4 App. Cas. 479, 484.

obviously the true construction of that section, namely, that the words must have been used alone (not in combination) as a trade-mark if they were to be registered within that part of the section; otherwise the previous part of the section would be unmeaning and useless. Upon the ordinary principles of construction that has been laid down as being the true view.

Now, my Lords, three questions apparently have arisen in respect of this matter. With reference to some observations made by the learned counsel who very ably argued the case on the part of the appellant, I must observe that the question which was raised in the American case was not the question that is now before your Lordships at all. The right of one trader to prevent another trader imitating his goods and making his goods pass as the goods of a rival trader depends on principles quite beside the question of trade-mark legislation, and proceedings could be maintained, as appears to have been done in the American case, to prevent the continuing infringement of the right of the trader not to have his goods imitated. Here we are dealing simply with the construction of the Act; and, as I have said, the first part of this case appears to depend on whether or not as a matter of fact the appellant can shew that before the passing of the Act of 1875 he used any "special and distinctive word or words" or "combination of figures or letters" as a trade-mark.

Now, my Lords, that is a question of fact, and what is the evidence? Looking at the affidavits which are used, and which constitute the only evidence to which I can apply myself, it appears to me that what was established as a fact was that the bottles, with this matter imprinted on them or blown into them, were what were commonly used; and I should say that, looking at the bottles that were used, what the appellant intended to distinguish his goods from other persons' goods by was these words blown into the bottles, "Perry Davis' Vegetable Pain Killer"; and I should have thought that if any proceedings had been taken to shew that the one trader was endeavouring to pass off his goods for another's the appropriate evidence by which that would have been established would have been to shew that the rival trader had either in the form of the bottle, or in the form

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of the label, used those words to distinguish his particular goods, from doing which no doubt he might be restrained.

Now, finding this difficulty in his way, the learned counsel ingeniously contended that the word "pain-killer" alone, dissociated from everything else, was what had been used. As a matter of fact I find against him on that, as each Court in turn has found against him. The evidence negatives it. It appears to me that that which was registered as a trade-mark was used as a trade-mark together with the words "Perry Davis'" and "vegetable," the one set of words forming, to my mind, just as much part of the trade-mark as the other. The result, therefore, is that on that part of the case alone there is sufficient to shew that this appeal cannot succeed.

My Lords, I am also of opinion that the word "pain-killer" is not "distinctive." The word "distinctive" itself requires exposition in this respect; "distinctive" in respect of what? I think it has been held (and I certainly think so myself), that the word "distinctive" means distinguishing a particular person's goods from somebody else's goods—not a quality attributed to the particular article but distinctive in that respect, that it means that it is a manufacture of his as distinguished from somebody else's. The manufacture may or may not be new, but that is the sort of distinction contemplated by the statute.

Then what is the meaning of the word "pain-killer"? It is not necessary to go into the grammatical question of whether it is used as an adjective or an epithet. It is enough to say simply that it attributes this particular quality to this particular medicine. It appears to me perfectly clear that that is neither "special" nor "distinctive" within the meaning of the statute. The result appears to me to be that upon both parts of this case, the user and the "distinctive" nature of the word, which it is necessary for the appellant to make out, he has failed.

Under these circumstances I move your Lordships that the appeal be dismissed with costs.

LORD HERSCHELL:—

My Lords, I am of the same opinion. I confess that I think this one of the most hopeless appeals which was ever argued

at your Lordships' Bar. In order to establish his case the appellant has to shew that the word or words "Pain Killer" has or have been used by him as a trade-mark prior to the year 1875, and that those words are "special and distinctive."

Lord Herschell.

My Lords, upon the question whether they are "special and distinctive" I do not intend to found my judgment at all. I certainly do not desire to express an opinion that they are, but I am not at present prepared to express a contrary opinion. The two words no doubt are common English words, and when used in combination do convey a specific idea; but inasmuch as that combination of words has never, so far as one knows, been applied to anything except this preparation made and sold by the appellant, they have come to be used as descriptive of that preparation, so that the use of those words and those words alone would suggest the idea of that preparation and nothing else. It may possibly be said that they are distinctive words inasmuch as they distinguish that preparation from any other medicinal preparation. That is perhaps the strongest way in which that part of the case could be put for the appellant. I desire to express no opinion upon the point whether that would be sufficient or not, because such a question may arise in some other trade-mark case hereafter, and I desire to be left perfectly free to deal with such a question when it arises.

In the present case, assuming the words to be distinctive, has the appellant shewn that they were used by him as a trade-mark prior to 1875? Now, my Lords, it has been held, or the opinion has been expressed at all events, by five learned judges, that on the true construction of the section words have not been used as a trade-mark if they have been used either in combination with other words or in combination with any device—in short, that they must be used alone as the trade-mark in order to be used as a trade-mark within the meaning of that section. No doubt has been cast upon the opinion so expressed by any learned judge, and it appears to me to be impossible to doubt that that is the true construction of the section when one reads the last clause of it in conjunction with those which immediately precede.

Well, assuming that to be the true construction, has the

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appellant brought himself within it? Clearly not. He has not used the word "Pain Killer" alone as his trade-mark. The words "trade-mark" in that section, or "used as a trade-mark," appear to me clearly to mean that by which a person marks, identifies, or distinguishes the goods which he manufactures or sells. Now, how has the appellant in this case marked, identified, or distinguished his goods? Not merely by putting upon them the words "Pain Killer," but by putting on them the words "Perry Davis' Vegetable Pain Killer." It seems to me impossible to say that he has used the words "Pain Killer" as his trade-mark. That being so, my Lords, it appears to me that the conclusion follows that he is not within the section, and has no claim to register these words as his trade-mark, and that they were properly expunged from the register.

LORD MACNAGHTEN:—

My Lords, I agree. It seems to me that there can be no question as to the true construction of the Act of 1875 so far as regards the matter now before your Lordships. The opinion expressed originally by Chitty J., approved by Cotton L.J., and by Lord Selborne, and not dissented from by any learned judge, but followed, as far as my recollection goes, in many cases, is undoubtedly correct. It seems to me also, upon the evidence, to be perfectly clear that the appellant did not use the word "Pain Killer" separately and alone as his trade-mark before the passing of the Act of 1875. I am, therefore, entirely of opinion that the appeal must be dismissed on that ground.

Upon the other question, whether the word is "special and distinctive" within the meaning of the Act of 1875, I prefer not to express any opinion.

LORD MORRIS:—

My Lords, I concur entirely in the judgment which has been given by the Lord Chancellor, and I shall merely add that I feel equally clear against the appeal upon the ground that the words "Pain Killer" are not "special and distinctive," as I do upon the other ground which was put by the noble and learned Lords who

have preceded me, that they were not words used separately and alone as a trade-mark.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 3rd July 1890.

Solicitor for appellants: *A. K. Common.*

Solicitors for respondent: *Wynne, Holme, & Wynne, for Evans, Lockett & Co., Liverpool.*

[HOUSE OF LORDS.]

THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY . . . . . } APPELLANTS;

AND

THE ASSESSMENT COMMITTEE OF THE BOLTON UNION AND THE OVERSEERS OF THE POOR FOR THE TOWNSHIP OF GREAT LEVER . . } RESPONDENTS.

Local Government Acts—Rural Authority—Powers for Lighting District—Order of Local Government Board—Assessment of Railway Company—Public Health Act 1875 (38 & 39 *Vict. c.* 55), *ss.* 161, 211, 229, 276.

The first paragraph of sect. 161 of the Public Health Act 1875 empowers an urban sanitary authority to contract with any person for the supply of gas, or other means of lighting the streets, markets, and public buildings in their district and to provide the necessary materials. The Local Government Board declared by an order under sect. 276 of that Act that the provisions of the first paragraph of sect. 161 should be in force within certain portions of a rural sanitary district, and invested the rural sanitary authority with all the powers, rights, capacities, &c. of an urban sanitary authority "under those provisions" within such portions of the district. The rural authority incurred lighting expenses under this order, and treated them as general expenses under sect. 229 of the Act. A poor rate having been made to defray the expenses a railway company was assessed in respect of the full rateable value of its property, which consisted of land occupied and used as a railway:—

Held, that upon the true construction of the order the rural authority was invested only with the power of an urban authority to incur lighting expenses under the provisions of the first paragraph of sect. 161 and not with the rating powers applicable to an urban authority under the Act; that the expenses were rightly treated as general and not as special

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expenses under sect. 229; and that the company was not entitled to be rated under sect. 211 of the Act and in the proportion of one-fourth part only of the rateable value.

The decision of the Court of Appeal (23 Q. B. D. 555) affirmed.

APPEAL from a decision of the Court of Appeal (1) upon a special case stated under 12 & 13 Vict. c. 45, s. 11, of which the following parts are material:—

The Bolton Union in the county of Lancaster is a rural sanitary district within sect. 5 of the Public Health Act 1875, and the Guardians of the Poor of the said Union are the Rural Sanitary Authority of the district within the meaning of the Act. The township of Great Lever is part of No. 1 Special Drainage District of the Union which is a contributory place within the said rural district.

On the 11th of December 1882 the Local Government Board, upon application made by the said guardians under sect. 276 of the Public Health Act 1875, made an order, which after several recitals (sufficiently set out in the judgment of the Lord Chancellor) proceeded as follows:—

"Until we by order otherwise direct, we hereby declare that the provisions of the first paragraph of sect. 161 of the said Public Health Act 1875, shall be in force within the said contributory places of Edgworth, Entwistle, Longworth, and Quarlton, and within so much of the said No. 1 Special Drainage District as is comprised in the said township of Great Lever; and we hereby invest the guardians of the poor of the said union, as such sanitary authority as aforesaid, with all the powers, rights, duties, capacities, liabilities and obligations of an urban sanitary authority, under those provisions, within the said portions of their district."

Under this order the guardians incurred expenses in obtaining a supply of gas and lamp posts for lighting the public roads and streets in the township of Great Lever.

These expenses the guardians treated as general expenses within the meaning of sect. 229 of the Public Health Act 1875, and to defray them served precepts in pursuance of sect. 230 on the overseers of the township requiring them to raise monies

(1) 23 Q. B. D. 555.

from the poor-rates of the township as the contribution to the general expenses of the rural sanitary authority.

On the 13th of February 1888 the overseers of the poor for the township made a rate or assessment for the relief of the poor for the purpose (amongst others) of defraying a portion of the said lighting expenses. By this rate the appellants were assessed in respect of property which consisted entirely of land occupied and used by them as a railway constructed under the powers of Acts of Parliament for public conveyance.

The appellants were dissatisfied with the rate so far as the same related to the said lighting expenses and claimed to be assessed under sect. 211 of the Public Health Act 1875 and in the proportion of one-fourth part only of the net annual value of their occupation. The assessment committee having refused to grant any relief, this case was stated.

The question for the opinion of the Court was whether the appellants were entitled to be rated in respect of the said lighting expenses under sect. 211 of the Public Health Act and in the proportion of one-fourth part only of the net annual value of their occupation.

If the Court should be of opinion that the appellants were entitled to be so rated judgment should be for the appellants; if of the contrary opinion, for the respondents.

The Court of Appeal (Cotton, Fry, and Lopes L.JJ.) reversing an order of the Queen's Bench Division and being of opinion that the railway company were not entitled to be rated under sect. 211 and in the proportion of one-fourth part only of the net annual value, ordered that judgment be entered for the respondents that the rate made on the 13th of February 1888 be affirmed (1). Against this decision the present appeal was brought.

July 4, 10. *F. Meadows White* Q.C. and *C. A. Russell*, for the appellants:—

The question depends on the construction of the order of the Local Government Board. The order should be read as incorporating sects. 207–211, both inclusive, of the Public Health

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Act 1875. So read the railway company's land will be entitled to the exemption granted by sect. 211 that such land is to be assessed in the proportion of one-fourth part only of the net annual value. Sects. 207–211 apply in terms only to urban districts and urban authorities, but by sect. 276 the Local Government Board may by order declare any provisions of the Act in force in urban districts to be in force in any rural district. This, it is submitted, the order in question has done by investing the rural authority "with all the powers, capabilities, &c., of an urban sanitary authority." "All the powers, &c.," must include the power of making a rate under sects. 210, 211. The same result will be attained if the lighting expenses are treated as "special expenses" under sects. 229, 230, in which case by sect. 230 land occupied by a railway company is entitled to the same exemption as that conferred by sect. 211. Sects. 229, 230 deal with the expenses of a rural authority, and the legislature clearly contemplated the application of the exemption to rural districts. The respondents have treated the lighting expenses as "general expenses," under sects. 229, 230, but it is submitted erroneously. Special expenses by sect. 229 expressly include a supply of water, to which lighting expenses are analogous. It cannot have been intended that market-gardens, railway-land, &c., which do not receive the same benefit as house property does from such expenses as a supply of water or gas, should be entitled to the exemption in urban districts and disentitled in rural. There is no principle in such a distinction. Read as the appellants propose the order carries out the intention of the legislature; read otherwise it works a manifest injustice.

R. Henn Collins Q.C. and *J. K. Bradbury*, for the respondents, were not heard.

LORD HALSBURY L.C.:—

My Lords, but for the length to which this argument has proceeded I should have thought this was a particularly plain case. Looking at the judgments of the learned judges in the Divisional Court, they appear to me, with submission to them, to have overlooked the whole question here of the machinery by which the

general object of the Act is to be carried out. What your Lordships have to construe is the order of the Local Government Board, and it appears to me that these somewhat complex provisions and the powers which are given, are all important, when one is construing the language of the order which the Local Government Board has in fact made.

I quite follow all that has been very ably suggested to us with reference to the differences of incidence in this kind of taxation upon different classes of property. It appears to me that the legislature had that in its mind, and ample provision is made for the particular conditions of urban and rural sanitary authorities. The legislature appears to have considered that the circumstances of one district may be totally different from the circumstances of another, and it has provided an elastic machinery by which the equity may be met in particular cases, by making some of the sections which are applicable to the urban sanitary authorities applicable, when need shall so require, to rural sanitary authorities. The discretion of doing so, and the mode in which that is to be done, are left to a particular government department. The government department may, if it pleases, make an order which will apply all or any part of the powers, duties, or obligations, and so forth, of the urban sanitary authorities to a rural sanitary authority, and, remembering that they may apply all or any part, the question comes before your Lordships now on the construction of this order what part they have applied, and what is to be the construction of an order, which, it is to be remembered, may or may not confer all or any of the powers of an urban sanitary authority.

Now bearing in mind what the powers are, let us see what is the particular order which has been made in this case, because it can hardly be denied that that is the question which your Lordships have to determine. The order commences by a recital of a certain order made in pursuance of the Public Health Act, and it proceeds to say: "And whereas by section 276 of the Public Health Act 1875 it is enacted that the Local Government Board may, on the application of the authority of any rural sanitary district, by order to be published in the *London Gazette*, or in such other manner as the Local Government Board may

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direct, declare any provisions of that Act in force in urban sanitary districts to be in force in such rural district and may invest such authority with all or any of the powers, rights, duties, capacities, liabilities, and obligations of an urban sanitary authority under that Act; and that such investment may be made either unconditionally or subject to any conditions to be specified by the Board as to the time, portion of the district, or manner during at and in which such powers, rights, duties, capacities, liabilities and obligations are to be exercised and attach." It then proceeds to refer to an order of the 12th December 1879 whereby the guardians of the poor of the Bolton Union were invested "with certain of the powers, rights, duties, capacities, liabilities, and obligations of an urban sanitary authority as regards certain portions of their district, including the contributory places of Edgworth, Entwistle, Longworth, and Quarlton." It recites then that certain orders were made on the 12th November 1880 whereby the said guardians were invested "with certain of the powers, rights, duties, capacities, liabilities, and obligations of an urban sanitary authority as regards certain streets or parts of streets in their district, including" certain streets which it proceeds to specify. Now we come to the operative part of the order. "Now therefore we, the Local Government Board," having received an application from the guardians of the Bolton Union, "do in pursuance of the powers given to us by the statutes in that behalf hereby order as follows":—

"Until we by order otherwise direct, we hereby declare that the provisions of the first paragraph of section 161 of the said Public Health Act 1875 shall be in force within the said contributory places," naming them.

Now, had it stopped there, it appears to be suggested by the learned counsel that that would of itself have been sufficient, because it would have imported as a necessary corollary from the powers given that the rate which that would have involved as a necessary part of the expense would be included in that part of the order. I do not at all assent to that. It seems to me that if we put in the order, instead of the reference, the thing which is actually referred to, the provisions of the first paragraph of the 161st section, it will be seen that all that has been done

by this order is to give to the rural sanitary authority the power to contract for lighting by gas the particular district named. I should be disposed to agree that if an Act of Parliament had placed upon a local authority or any other body a power or obligation to do a particular thing, presumably that would have carried with it the power to do that thing by the only mode by which it could be done, namely by raising a rate; and there are various instances under Acts of Parliament where that implied power has undoubtedly been given. So far I agree with the argument. But that argument has no place where you have a whole elaborate and indeed somewhat complex machinery whereby the expenses of carrying that part of the Act into execution are provided for, and the particular injustice which is suggested to exist in this case is avoided directly by looking at the powers which exist in the statute and by the proper application of which that injustice, if there be an injustice, could be removed. There was nothing to do but to apply to the Local Government Board for an order directing these particular expenses to be made special expenses, and if that had been done the whole question which your Lordships have heard argued at such length would have disappeared. If they had thought right to do it that might have been done, and if the Local Government Board had given that authority the very thing which is now insisted upon would have existed in the district.

But it is argued that we are to give a different construction to the order because the Local Government Board undoubtedly had the power, if they had thought proper, to insert it as part of their order and to make these "special expenses" within the meaning of the statute. My Lords, it seems to me that that is the strangest perversion of the rule of construction that ever I heard. Where a thing is granted it may be reasonable enough to say that you should assume and imply the power to use the grant or to do the thing which the Act of Parliament renders it necessary you should do. But where there is an authority erected expressly to determine how and under what circumstances the thing shall be done, and what the powers and obligations shall be which shall be conferred upon rural sanitary authorities, it is certainly a very odd argument in construing an order which

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does not expressly give them, to say that you must begin by assuming that although the order does not itself convey them expressly and in terms they were meant to be given.

My Lords, it seems to me obvious that you must construe this order as you would construe any other instrument when there is a power to do that which it is said can be done by implication here. The whole code which is included in sects. 211, 229, 230, and 276 appears to me to dispose of the argument altogether. By a proper application of those sections, the thing that is insisted upon could have been done had the Local Government Board thought it right that it should be done. It has made an order which, it appears to me, expressly excludes the power now insisted upon, and your Lordships are asked by construction to put into that order what is not there.

Under these circumstances I can have no doubt whatever that the order of the Court of Appeal was right and I move your Lordships that this appeal be dismissed.

LORD HERSCHELL :—

My Lords, I am of the same opinion. I can entertain no doubt that the judgment of the Court below was right.

The question turns upon the construction of the order made by the Local Government Board. By that order they have declared, as they were empowered to do by the 276th section of the Act, that the provisions of the first paragraph of sect. 161 of the Act shall be in force within the district in question or a portion of it, and they have conferred upon the rural authority all the powers, rights, duties and capacities of an urban sanitary authority under those provisions. Now those provisions simply empower the urban authority to contract for the supply of gas, and to provide lamps, lamp-posts, and other necessary materials and apparatus. It appears to me to be clear that all that the order in terms does is to give to the rural authority the power which in that part of the section the Legislature has conferred upon an urban authority. No doubt in giving them power so to contract, it makes the expenses incurred by reason of their carrying out those contracts expenses incurred by them under the authority of the Act; but it appears to me to do no more than

that. The 161st section does not determine in the case of an urban authority how those expenses are to be met. If nothing else had appeared in the Act it might have been necessary to imply a power to rate, and to determine what should be the conditions of rateability. But the Legislature has not left the matter to implication; it has expressly provided, first of all by sect. 209, that "in the district of every urban authority whose expenses under this Act are directed to be defrayed out of the district fund and general district rate there shall be continued or established a fund called the district fund"; and next it has provided by sect. 210 that "for the purpose of defraying any expenses chargeable on the district fund which that fund is insufficient to meet" a district rate may be levied, and then it prescribes the conditions under which that district rate is to be levied.

Now the authority to incur an expense which is to be an expense chargeable under the Act is one thing; the mode of raising the money to meet that expense, with the incidence of liability to share that expense, is quite another. The Legislature has dealt with the two matters entirely separately; and it seems to me impossible to say that when there is power in the Local Government Board to apply all or any part of the provisions of the Act and give any of the powers of the Act to a rural authority, because they have given them power to incur a certain expense by doing the works or entering into the contracts authorized by a particular section, they have ipso facto conferred all the powers of meeting the expense of carrying out such works or of completing such contracts which are vested in an urban authority. The expenditure appears to me to be one thing, the mode of meeting that expenditure quite another. If the Local Government Board had desired, it might, or I think it may be probable that it might (it is not necessary to determine the matter at the moment) have applied to a rural district all the rating sections having reference to an urban authority. But where it has not made such application of them the expenses incurred in carrying out the authorized contracts become expenses incurred by the rural authority in the execution of the Act just as much as if the Act had of itself authorized those

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expenses. I am quite unable to distinguish between expenses incurred by a rural authority in doing that which the Act expressly authorizes them to do, and the expenses incurred by them in doing that which the Act enables a public body to authorize them to do. There appears to me to be no distinction. All those expenses are expenses incurred in the execution of the Act. And therefore when the order of the Local Government Board authorized the contracts under sect. 161, they thereby authorized the incurring of those expenses, and they became expenses of the rural authority (no other provision of the Act being made applicable) to be met in the manner prescribed by sect. 229.

My Lords, if such a construction of the Act or of the order necessarily led to any injustice I can understand an effort being made, although it would be somewhat straining the language used, to give effect to the arguments which have been addressed to us by the learned counsel for the appellants. But really nothing of the sort need take place. The Local Government Board I have no doubt in some way or other, either by declaring these to be special expenses when the expenses are incurred in respect of a portion only of the rural district or by applying the rating power of the urban authority, has full power and capacity to prevent any injustice of the kind which has been suggested. And I think it really was intended to leave the matter to the Local Government Board, because the mode of taxation differs in an urban district from that which prevails in a rural district. The scheme in the urban district is that these exemptions apply in all cases; every urban district rate, whatever its purpose, whatever the expense to be met, is made subject to these exemptions; but in the case of a rural district the legislature has provided another scheme for all the general purposes of administration, and it has said that these exemptions are not to apply. For the purpose of disinfection and the conveyance of infected persons these exemptions are not to apply—indeed they are not to apply to anything except the matters specified in sect. 229, unless the Local Government Board so orders. The matter is left in the discretion of the Local Government Board whether they shall be special expenses, in which case there is

this exemption, or whether they shall be general expenses, in which case there is no exemption. Now it may very well have been thought that just as in the case of establishing hospitals or providing medicine or medical assistance for the poor it was proper to leave it to the Local Government Board to determine whether they should be special expenses or general expenses, so in the case of the extension to a rural district of the powers given to an urban district it might be proper that the Local Government Board should consider whether it was a case in which it was more fitting that the expenses should be borne by the same persons who bear the general expenses in a rural district or whether they should be borne in the way in which the general expenses are borne in an urban district. It may well have been that the legislature thought that the Local Government Board having in view these two schemes would look at the particular case and consider whether the one scheme or the other ought to apply in the case of those new expenses which for the first time had to be raised by the local authority; and I have no reason to doubt that upon proper representations the Local Government Board would take the necessary steps to prevent anything like injustice or anything in opposition to the general intention of the legislature.

Under these circumstances I think the appeal ought to be dismissed.

LORD MACNAGHTEN :—

My Lords, I am entirely of the same opinion.

LORD MORRIS :—

My Lords, I concur.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 10th July 1890.

Solicitors for appellants: *Woodcock, Ryland & Parker for C. Moorhouse, Manchester.*

Solicitors for respondents: *Charles W. Rawlinson for Holden & Holden, Bolton.*

[HOUSE OF LORDS.]

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THE COMMISSIONERS OF INLAND REVENUE . . . . . } APPELLANTS;

AND

JAMES FORREST (SECRETARY OF THE INSTITUTION OF CIVIL ENGINEERS) . . . } RESPONDENT.

Revenue—Bodies Corporate or Unincorporate—Income or Profits of Property—Duty—Exemption—Property appropriated for Promotion of Science—Customs and Inland Revenue Act 1885 (48 & 49 *Vict. c.* 51) *s.* 11, *sub-s.* 3.

By sect. 11 of the Customs and Inland Revenue Act 1885 a duty is imposed upon the annual value, income or profits of property belonging to any body corporate or unincorporate, subject to an exemption by sub-sect. 3 in favour of "property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts."

In this exemption "science" is not confined to pure or speculative science, or science generally, but includes various branches of science.

Held, by Lords Watson and Macnaghten, Lord Halsbury L.C. dissenting, that the property of the Institution of Civil Engineers was entitled to the exemption, because it was in fact legally appropriated and applied substantially for the promotion of mechanical or engineering science, and not for the promotion of the professional interest or advantage of the members.

The decision of the Court of Appeal (20 Q. B. D. 621) affirmed.

APPEAL from a decision of the Court of Appeal, reported as *In the Matter of Duty on the Estate of the Institution of Civil Engineers* (1). The Queen's Bench Division (Lord Coleridge C.J. and Field J.) holding that the Institution of Civil Engineers was liable to the duty imposed by sect. 11 of the Customs and Inland Revenue Act 1885, and did not come within the exemption granted by sub-sect. 3, made an order that the secretary of the Institution of Civil Engineers, the respondent in the present appeal, pay to the Commissioners the duty assessed by them on the property of the institution (2). This order was reversed by the Court of Appeal (Lord Esher M.R. and Fry L.J., Lopes L.J. dissenting), on the ground that the institution came within the

(1) 20 Q. B. D. 621. (2) 19 Q. B. D. 610.

exemption (1). The case turned upon an affidavit made by the secretary, the charter and bye-laws of the institution, and a report of the council dated May 1886, the material parts of which are fully stated in the reports of the decisions below and are referred to in the judgments in this House.

1889. Nov. 12, 14. Sir *R. Webster* A.G. and *A. V. Dicey* (Sir *E. Clarke* S.G. with them) for the appellants:—

In order to claim the exemption given by sub-sect. 3 of sect. 11 of the Act, the property, or the income or profits, must be "legally appropriated and applied for any purpose connected with any religious persuasion or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts." The words under which the Institution of Civil Engineers seeks to bring itself are "for the promotion of science." These words are much narrower than the words "for any purpose connected with any religious persuasion," and they must be read strictly. "Promotion of science" means enlarging the boundaries of science, not the instruction or improvement of a profession. It is admitted that the property of this institution is applied in accordance with the charter and bye-laws; but when these are looked at it appears that the main, the primary, object of the institution is to promote the interests of the profession of engineers, to make good engineers, and not to increase scientific knowledge. The institution no doubt applies the principles of science, but civil engineering is an art not a science. The distinction between science and art is emphasized in sub-sect. 3 by the words "or the fine arts." Art is "skill; the result of habit regulated by rules, as opposed to science which is determined by laws." (2) Under 6 & 7 Vict. c. 36, s. 1, exemption from rateability was conferred upon land or buildings belonging to any society "instituted for purposes of science . . . exclusively," and it was held that this society was not exempt under that Act: *Reg.* v. *Institution of Civil Engineers* (3). The word "exclusively" is not in the Act now in question; but the word "mainly" must be understood, and this society's main purpose is to benefit the

(1) 20 Q. B. D. 621.
(2) Johnson's Dict., by Latham.
(3) 5 Q. B. D. 48.

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profession. The main object in those joining is to make pecuniary gain, as in *Society of Writers to the Signet* v. *Commissioners of Inland Revenue* (1).

[They also referred to the case of the United Service Institution, viz., *Reg.* v. *Cockburn* (2); *Russell Institution* v. *Vestry of St. Giles* (3); the case of the Cambridge Philosophical Society, viz., *Purchas* v. *Churchwardens of the Holy Sepulchre* (4); and the case of the London Library, viz., *Earl of Clarendon* v. *Rector of St. James'* (5), all decided under 6 & 7 Vict. c. 36, s. 1.]

Sir *Horace Davey* Q.C., and *J. F. Moulton* Q.C. (*F. R. Y. Radcliffe*, with them), for the respondents:—

There is no difficulty in applying the statute to the present case if one looks at the plain words of the charter, "a society for the general advancement of mechanical science." "Promotion of science" no doubt includes the enlarging the area of science, but it also includes the encouragement of means for diffusing scientific knowledge more widely, the extension of knowledge of the facts and laws of physical science, and the mode in which they can be made useful to man. And it is not the less a promotion because it is effected through the medium of a limited body and not through the general public. Mechanical science is one of those sciences which are best promoted by collecting specialists together. This is not like an institution for teaching trade secrets which do not increase the general knowledge of science. This institution does for mechanical science what the Royal Society does for science generally. It appears from the Report that of the total expenditure of £15,000 the whole is spent on science except what is spent on the students. The fact that money is made by the profession of engineers cannot take it out of the exemption, any more than in the case of a chemical institution nearly all of whose members being chemists make money out of the sale of drugs. In *Reg.* v. *Royal Medical and Chirurgical Society of London* (6), decided in 1857 under 6 & 7

(1) 14 Court Sess. Cas. 4th Series, 34.
(2) 16 Q. B. 480.
(3) 3 E. & B. 416.
(4) 4 E. & B. 156.
(5) 10 C. B 806.
(6) 30 L. T. (O.S.) 133; 21 J. P. 789.

Vict. c. 36, s. 1, the same arguments against exemption were urged as now, but the society was held exempt, though the statute contained the word "exclusively." Engineering science is on the same footing as chemical science. The question is, is the immediate advantage to the public at large, or to the members of the profession? Judged by that test this institution comes within the exemption.

Dicey, in reply, referred to *Reg.* v. *Brandt* (1).

[LORD HALSBURY L.C. referred to *Churchwardens of St. Anne* v. *Linnæan Society* (2).]

The House took time for consideration.

1890. Aug 1. LORD HALSBURY L.C.:—

My Lords, the question in this appeal is, whether the Institution of Civil Engineers is liable to be assessed in respect of the annual value, income, or profits of their property to the duty imposed by Part II. Section 11, of "The Customs and Inland Revenue Act 1885," or whether their property is entitled to exemption under sub-sect. 3 of the same section.

It is not disputed that the property is liable to duty unless the exemption applies. The exemption is in these words: "Property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts." For the purposes of this discussion it is immaterial to consider the exact meaning of any of the words except the word "science," except also so far as the other words may in their collocation or otherwise reflect light upon the true meaning to be given to the word "science."

It is, of course, impossible to contend that the word "science" is to be understood in its widest sense as being equivalent to knowledge, since, if it were, the exemption would practically withdraw every institution from taxation, inasmuch as, to use the language of one of the great philosophical teachers of Germany,

(1) 16 Q. B. 462. (2) 3 E. & B. 793; 23 L. J. (M. C.) 148.

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in his lectures on the Vocation of a Scholar, "Culture must not be one-sided, but all-sided." And I agree with the Lord Chief Justice that if such an interpretation were to be given to the exemption "it would be very difficult to imagine any institution whatsoever which would be excluded." There is no branch of knowledge, however apparently trivial and unimportant, which may not (nay, which does not) contribute something to the storehouse of "science," so interpreted. I think, therefore, it would be unreasonable to suppose that an exemption so wide as practically to make the tax inoperative could have been in the mind of the legislature.

But in the exemption itself I find, as an additional head of exemption, "the fine arts;" not *all* arts, it will be observed, but *the fine arts*. I infer, therefore, that the legislature intended that an institution for the promotion of an art, unless it were a fine art, was intended to be subject to taxation. Now, without supposing that the statute contemplated the controversy (now many centuries old) between what was an art and what was a science, I think one may see by the generality of its phraseology, "education," "literature," "science," and the limitation of "the fine arts" to the last head of exemption, that it did intend to exclude from its operation all institutions which could not broadly be described as being for the promotion of education, literature, science, or the fine arts; that is to say, education generally, literature generally, and science generally.

I do not stop here to discuss the question of whether the exemption would be lost by some additional object or purpose, since I agree with almost all who have considered this question, that the statute would be satisfied if the main purpose and object of the institution were that which the statute considers the subject of exemption.

Now, though I do not mean to say that all the cases under the earlier statute can be absolutely reconciled, yet I think a principle can be deduced from them, which is very relevant to the matter in hand. The Zoological Society (1) and the Russell Institution (2) were held not to be within the exemption; and with reference to the fine arts, though music was assumed to be

(1) 3 E. & B. 807; 23 L. J. (M.C.) 139. (2) 3 E. & B. 416.

one of the fine arts, a musical institution (1) was held not to be within the exemption, whereas the Linnæan Society (2) and the Birmingham Library (3) were held to be within it.

When one examines the various grounds on which these decisions rested, it would appear that wherever the amusement of the members, as in the Musical Society, amusement though combined with the instruction derived from the study of natural history, as in the Zoological Society, the supply and opportunities of reading newspapers, as in the Russell Institution, was one of the purposes and objects of the institution, then the judges were of opinion that the exemption would not apply. But where, as in the Linnæan Society, the object was purely the promotion of the particular branch of knowledge to which that institution applied itself, or, in the case of the Birmingham Library, where the judgment of the Court assumed that literature generally was the object of the society, then the exemption did apply.

These cases were decided under the Act of 1843, which enacts: "Whereas it is expedient that societies established exclusively for purposes of science, literature, or the fine arts, should be exempt from the charge of county, borough, parochial, and other local rates, in respect of land and buildings occupied by them for the transaction of their business, and for carrying into effect their purposes; Be it therefore enacted," &c. "That from and after the 1st day of October 1843 no person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay to any county, borough, parochial, or other local rates or cesses in respect of any land, houses, or buildings, or parts of houses or buildings, belonging to any society instituted for purposes of science, literature or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business and for carrying into effect its purposes: Provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division or bonus in money, unto or between any of its members, and provided also that such

(1) 16 Q. B. 462. (2) 3 E. & B. 793.
(3) 10 Q. B. 868.

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society shall obtain the certificate of the barrister-at-law or Lord Advocate as hereinafter mentioned."

It is said, however, that the cases under the Act of 1843 ought not to guide us because of the difference in the two Acts. Now though the Acts are differently framed, the words which your Lordships have to construe are practically identical. Property legally appropriated and applied for the promotion "of literature, science, and the fine arts" in the one Act corresponds very nearly with a society "instituted for purposes of science, literature, or the fine arts," in the other. Two differences are suggested, one that the Act of 1843 was a relief of existing liability to local rates; I agree that such a distinction exists, but I am wholly unable to apply such a distinction as relevant to the matter in hand. All exemptions from taxation to some extent increase the burden on other members of the community, and I confess I cannot imagine the Legislature meant one thing in 1843 by "science" and a different thing in 1885, when it was determined to make corporations which never die pay something in lieu of succession duty.

Neither does the use of the word "exclusively" appear to me to touch the particular point. Baron Parke (1), in construing the earlier Act, pointed out that the word "exclusively" was not necessary. Can it be said that "property which, or the income or profits whereof," is "legally appropriated and applied" must not be *exclusively* "appropriated and applied" in order to bring such property within the exemption? The omission of the word "exclusively" means nothing, since its existence or non-existence could add nothing to the true construction of the words that are there.

I cannot concur with the argument which has found favour with one of your Lordships, that the condition under which a society obtained exemption under the Act of 1843 was that in some degree it partook of the character of a charitable institution. I think it would be a surprise to the members of e.g. the Linnæan Society to hear their society so described. It is no reflection on the council of the institution in question that they are desirous to promote the success of their members in the pro-

(1) See *Purvis* v. *Traill* (3 Ex. at pp. 349, 350).

fession to which they belong, and that they wish to promote their success in the best way by supplying them with the best possible professional education.

I am wholly unable to see that there is any difference between the two Acts, both of them involving exemption from public burdens, whether local or imperial, and both of them using language which, as I have said, is practically identical; and, through the framing of the Acts being necessarily different, from the fact that one refers to a corporation and the other to societies, the other differences, which I do not think relevant to the subject now under discussion, are quite accounted for, without supposing that the word "science" is to receive a different interpretation in the two different Acts.

Assuming, therefore, that the principles I have suggested are to decide the matter, it becomes a question of fact whether in this particular case the institution is for the promotion of science, in the sense in which I understand that word.

In the historical notice which is part of the case I find it is stated that "early in the present century it was desired to found an institution having for its object the furtherance of professional knowledge," and that the institution was in fact founded by gentlemen who were "impressed with the difficulties of gaining the knowledge necessary for the diversified practice of engineering, for promoting regular intercourse between persons engaged in the profession, to the end that such persons might mutually benefit by the interchange of individual observation and experience."

My Lords, I have quoted these words, not in the nature of an admission by the society (for which purpose a mere historical sketch would be very unfairly used), but because I think they aptly describe, in fact, both the purpose for which the institution was founded and the practice under it.

The constitution itself is for the benefit of persons who are civil engineers, and to facilitate their work, and to instruct them better in their own profession; to enable them the better to perform and practise the art by which they were to make their livelihood. They were to be instructed (the mode of instruction appears to me to be immaterial, whether by lectures, papers read,

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or the like) in various arts, and in various applications of arts, as to which, except in the widest general sense, which, I have already said, I do not assume the statute intended, it could not be contended that such instruction was for the promotion of science.

The statement is that "The persons for whose benefit the society has been formed are defined by its chartered title, 'The Institution of Civil Engineers.' As the exact meaning of the words 'Civil Engineers' is very important, and has given rise to much discussion, the council considers it desirable to state the sense attached to them by the institution.

"The charter defines 'the profession of a civil engineer' as 'the art of directing the great sources of power in nature for the use and convenience of man,' and some examples of this definition are given. But it was pointed out by Thomas Tredgold, who drew up the 'description of a civil engineer,' partly embodied in the charter, that 'the scope and utility of civil engineering will be increased with every discovery in philosophy, and its resources with every invention in mechanical or chemical science.' Consequently, since the charter was drawn, the range of practice of the profession has become much enlarged. Thus the practitioners in this art may now have to do with many classes of works, for example: 1. Works for facilitating and improving internal communications, as roads, railways, tramways, navigation by canals and rivers, bridges, and telegraphs of various kinds. 2. Works connected with the sea coast, and for facilitating communication between the sea and the land, such as harbours, docks, piers, breakwaters, sea-walls, lighthouses, &c. 3. Works for facilitating communication across the seas, including naval architecture, iron ship building, and the construction and laying of submarine telegraph cables. 4. Works for reclamation, irrigation, or drainage of land; and for the prevention or the regulation of floods, including the improvement of rivers as arterial drains. 5. Works for cities and towns, such as sewerage, water-supply, light, and street improvements. 6. Large and massive buildings generally in their scientific and mechanical arrangements. 7. The operations of mining and of metallurgy, so far as they involve the application of mechanical science. 8. The design and

construction of the mechanical prime-movers, such as steam-engines, water-wheels, and other hydraulic motors, windmills, electric and other engines. 9. The design, construction, and adaptation to practical use of machinery and mechanical appliances of all kinds. 10. The design and manufacture generally of all large and important metallic structures, including artillery and other large munitions of war.

"This is a comprehensive but by no means complete catalogue, and if an estimate is attempted to be formed of the work done under it during the last century, and of the effect this work has had on the development of trade and commerce, on finance, on government, on every branch of industry, and indeed on every possible aspect of human interest, it must be admitted that the profession of civil engineering has become truly a great power."

And, in exact accordance with the design which the founders of the institution had in view, I find premiums have been awarded for such papers as: "Modern machine tools and workshops appliances for the treatment of heavy forgings and castings;" "The hydraulic passenger lifts at the underground stations of the Mersey Railway;" "Brickmaking."

The council of the institution is entrusted under various trusts to award prizes or medals to persons who write papers on the subjects with which the institution is conversant, and although this has only an indirect bearing on what the institution is, it is, I think, not without its importance as showing the class of subjects which persons who were interested in promoting the interests of civil engineers imagined would be appropriately dealt with by the institution in question.

I find in the subjects for papers what I should have expected to find for an institution of such a character as I have described: "The construction and testing of air locks and shaft tubes for sinking foundations;" "Concrete work under water;" "The manufacture, properties, and use of castings of malleable cast-iron and cast-steel;" "Modern appliances for the consumption of liquid fuel for steam boilers and other industrial uses;" "The production of heating gas from coal;" "Compressed oil gas and its applications;" "The driving axles of locomotive engines."

These and many others seem to me to indicate that the real

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object and purpose of this institution (which certainly needs no eulogy from me or from anyone else in respect of its usefulness) is to promote the education of civil engineers as civil engineers; to enable them to succeed in their profession; to enable them to take charge of and direct works of the most complicated, difficult, and extraordinary value—such triumphs, for instance, of modern engineering as the Forth Bridge and the like. But all this, to my mind, tends to shew that it is a professional society founded for the advantage and in the interests of the profession of civil engineers, supplying most valuable and important means for the training and instruction of that profession, but for the interest and advantage of the members of the institution, as members of the institution, and therefore not within the exemption.

To use the language of Lord Campbell, in one of the cases to which I have referred: "I think a member of it makes a very good bargain for himself in becoming a member of it," and I do not think that, unless the benefit was intended to be conferred directly and not indirectly upon the whole community in the promotion of knowledge, the legislature intended to exempt from taxation an institution such as this, which in my view is primarily intended in the interest of, and for the advantage of, its own members.

I am therefore of opinion that the judgment of the Court of Appeal ought to be reversed, and the judgment of the Queen's Bench Division restored.

LORD WATSON:—

My Lords, the 11th section of The Customs and Inland Revenue Act 1885 imposes a compensatory duty at the rate of 5 per cent. upon the yearly value, income, or profits, accruing from real and personal estate permanently vested in bodies corporate and unincorporate, which escapes liability to probate, legacy, or succession duties. The taxing enactments of the clause are expressed in broad and comprehensive terms, but these are qualified by seven sub-sections, which exempt from the incidence of the new tax the various classes of property therein specified, in respect either of the time and manner of its acquisition, or of the purposes to which it is appropriated and applied.

The appellants assert their right to charge the respondent as the officer whom the statute makes accountable for the Institution of Civil Engineers, with duty upon the annual income of the institution during the year ending the 5th of April, 1886. It is not disputed that the property sought to be charged is within the general taxing words of the Act; but the respondent pleads that it is also within the exemptions provided by the 11th clause. His plea was rejected by a Divisional Court, consisting of Lord Coleridge C.J., and Lord Field; but it was sustained in the Court of Appeal by Lord Esher, M.R., and Fry L.J., Lopes L.J. dissenting from the judgment.

The exemption relied on by the respondent is to be found in sub-sect. 3 which specially excepts from the operation of the clause "Property which, or the profits or income whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts." In order to obtain the benefit of the exemption it must be shewn, in the first place, that the property for which it is claimed is, in point of fact, applied to one or other of the purposes thus specified; and in the second place that it is legally appropriated to such purpose within the meaning of the statute. The respondent maintains that the property and funds of the institution which he represents are devoted and applied to the promotion of science; the appellants contend that they are not. That is the whole matter of controversy in this appeal.

The Institution of Civil Engineers was incorporated by Royal Charter in June 1828. The "objects and views" of the body, politic and corporate, for the advancement of which it was expressly created, are stated to be "for the general advancement of mechanical science, and, more particularly, for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man, as the means of production and of traffic in states both for external and internal trade, as applied in the construction of roads, bridges, aqueducts, canals, river navigation and docks, for internal intercourse and exchange, and in the construction of

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ports, harbours, moles, breakwaters and lighthouses, and in the art of navigation by artificial power for the purposes of commerce, and in the construction and adaptation of machinery and in the drainage of cities and towns." The charter prescribes rules for the government of the corporation, by which general meetings are authorised to make bye-laws for the admission of members and the management of its property, and also to enter into any resolution that shall be thought necessary and proper with respect to the affairs and concerns of the body corporate, subject to the condition that bye-laws or resolutions made contrary to the general scope and true intent of the charter shall be absolutely null and void.

Since the date of its incorporation alterations have been made from time to time in the bye-laws of the institution; but there has been no material change either in the qualifications for membership, or in its objects and the means of their attainment. According to the bye-laws now in force, the persons entitled to the privileges of corporation consist of three classes: (1) members, being civil engineers of eminence in their profession who have been in practice on their own account for five years at least; (2) associates, who must be above twenty-five years of age, regularly educated as civil engineers, and actually engaged in the design or construction of one or more of the class of works enumerated in the charter; and (3) honorary members, being either distinguished individuals, who from their position can assist in the promotion of public works, or persons eminent for science and experience in pursuits connected with the profession of a civil engineer, but who are not engaged in the practice of that profession within the United Kingdom or its dependencies. The same degree of professional eminence is not required in the case of associates as in the case of members; but the former may be transferred to the higher grade when they become duly qualified. Students of civil engineering who are not members, and have no voice in the management of the society, are admitted to certain privileges; but they can only enjoy that position between the ages of eighteen and twenty-six, and they must be the present or past pupils of a member, and have the object or intention of becoming engaged in the design or

construction of engineering works. Admission to corporate privileges is by ballot, and any corporator may be expelled by the majority of a special meeting, convened on the requisition of twenty members, with the approval of the council of management. Students are admitted by the council on the recommendation of the member whose pupils they are or have been, and the continuance of their privileges is dependent upon the pleasure of the council.

During the session of the society, which commences in November and ends in the month of May following, weekly meetings are held, at which papers on engineering subjects selected by the council are read and discussed. These discussions are taken down in shorthand, and, with the papers read, are inserted at full length in the minutes of the society's proceedings, which are annually printed, and a copy sent to every corporate member and student. The minutes are not sold, but copies of them are sent to 185 similar institutions and public libraries in different parts of the world, in order that persons interested in engineering science may have access to them. Meetings are also held by the students at which papers prepared by themselves are read and discussed; and such of these papers as possess exceptional merit are published in the minutes of the institution. The library, which contains a large collection of native and foreign works on engineering, besides standard books of science, is open to corporate members for consultation and reference, and students have the privilege of using it subject to regulations prescribed by the council.

The appellants relied in argument upon *Reg.* v. *Institution of Civil Engineers* (1), in which it was held by a Divisional Court, consisting of Lord Field and Mr. Justice Manisty, that the institution was not exempted from payment of local rates in respect of the premises which it occupied by virtue of sect. 1 of 6 & 7 Vict. c. 36. That Act exempts from the incidence of county, borough, parochial, and other local rates, premises occupied for the transaction of its business by a society "instituted for purposes of science, literature, or the fine arts exclusively," it being expressly conditioned that "such society shall be supported

(1) 5 Q. B. D. 48.

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wholly or in part by voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto and between any of its members." These provisions appear to me to differ so much, both in their subject-matter and scope, from the exempting enactments with which we have to deal in this case, that little or no assistance can be derived from them or from the decisions which followed upon them, in construing the Act of 1885. There are many societies excluded from the benefit of the exemptions established by the earlier, which are plainly entitled to the immunity provided by the later statute. In order to bring a society within sect. 1 of the Act of 1843, two statutory requisites must concur. The society must be one instituted exclusively for purposes of science, literature, or the fine arts; and it must also be supported, in whole or in part, by annual voluntary contributions. I do not think the legislature intended that fixed yearly payments which individuals agree to make in consideration of their being admitted to a society and allowed to share in its management (there being a legal obligation to make such payments as long as their membership continues), should be regarded as voluntary contributions within the meaning of the Act. But the contrary was decided, after some hesitation, and to that circumstance the difficulties subsequently encountered in construing the exemption appear to me to have been mainly due. Then it is not sufficient compliance with the plain language of the Act that a society be established chiefly for the purpose of promoting science, literature, or the fine arts. One or other of these must be its exclusive object; so that an institution which also contemplated some other, though altogether subsidiary object, could not claim the benefit of the exemption.

The provisions of sub-sect. 3 present in several important particulars a striking contrast to these enactments. They dispense with the necessity for any of the enumerated purposes being exclusive, it being sufficient that the property of the institution is in the main devoted to one or other of them; and the exemption is made to depend upon the appropriation and application of such property or its income, without reference to the sources from which it is acquired. I think the general

construction of the sub-section was correctly expressed by the Lord President (Inglis), in the Scotch case of *Society of Writers to the Signet* v. *Commissioners of Inland Revenue* (1), the only decision before the present case on this branch of the Act of 1885. His Lordship, after pointing out that societies whose funds are expended mainly upon other objects, and only promote indirectly the purposes enumerated, are not within the protection of the clause, goes on to say: "But I apprehend that the meaning of this clause of exemption is that the property or income shall be, if not exclusively, yet certainly in the main and as its chief object, devoted to the promotion of education, literature, science, or the fine arts." The principle thus enunciated was referred to, and appears to have been unanimously accepted both in the Divisional Court and in the Court of Appeal, although the learned judges differed in its application to the facts of this case.

The contrast between the provisions of the two statutes becomes more apparent when the other sub-sections of the Act of 1885 are taken into account. In this case Lord Field said, in the Divisional Court, with reference to sub-sect. 3: "It seems to me that the exemption is intended to some extent to be correlative with the public benefit derived from the corporate body; that is to say, that the statute did not contemplate the exemption of bodies conferring mere individual local benefits." That observation might be very appropriate, and similar language has been used by learned judges in dealing with the Act of 1843; but I do not think it is applicable to the exemptions in sub-sect. 3, which depend upon the intrinsic character of the object which a society promotes, and not upon the scope of the benefits which may result from its transactions. Sub-sect. 2 expressly exempts property, or its income, which shall be legally appropriated and applied "for the benefit of the public at large, or of any county, shire, borough, or place, or the ratepayers or inhabitants thereof." If societies instituted for the promotion of science must shew that they are conferring a benefit upon the public at large, in order to obtain exemption, the provisions of sub-sect. 3 add nothing to the provision already made in sub-sect. 2. But the enactments of the latter

(1) 14 Court Sess. Cas. 4th Series, 34.

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appear to me to compel a liberal reading of the sub-section which follows it, and to indicate the intention of the legislature to exempt every society whose corporate endeavours are mainly directed, whether successfully or no, to the extension of the bounds of science, and are not, as in the case of the Society of Writers to the Signet, confined to the individual action of the corporators, each within the limits of his own professional business, and for his own private interest.

The judgment of the Court in *Society of Writers to the Signet* v. *Commissioners of Inland Revenue* (1) was given against the body pleading statutory exemption; and in the circumstances of the case, there cannot, in my apprehension, be any doubt as to its soundness The position of the society, so far as concerns its constitutional objects, is strictly analogous to that occupied in England by the Inns of Court, and in Scotland by the Faculty of Advocates. It is simply one of several portals through one or other of which an individual must pass before he can practise as an agent before the Court of Session. Persons who prefer to enter their profession by that portal join the society; but their chief, if not their only object in doing so is to acquire the status and privileges of a duly qualified legal practitioner. Their qualifications are tested by examination before admission; but when once they have become members, they do nothing whatever towards advancing the science of law, unless it be by actively pursuing their profession in their individual capacity.

The Institution of Civil Engineers stands in a very different position from such professional bodies as the Society of Writers to the Signet. The mere fact that membership is confined to those who are actively engaged, and have attained some degree of eminence, in the profession, does not militate against the object of the institution being the advancement of engineering science; because they are really the only persons possessing the knowledge and practical experience requisite for the efficient promotion of that object. Membership is not required for admission to the profession of a civil engineer: it confers no rights or privileges in the practice of that profession, over which the institution neither has, nor professes to have any power

(1) 14 Court Sess. Cas. 4th Series, 34.

of control. A writer to the signet, in carrying on his private business, and practically in no other form, exercises his rights and privileges as a member of the society to which he belongs; but a member of the Society of Civil Engineers does nothing whatever in his corporate capacity, except when he takes part in its proceedings within the walls of the institution. Lord Coleridge suggests that "any man who wants most effectively and successfully to practise the profession of a civil engineer, will join the institution, and go through the course of teaching which it provides." Now, I have been unable to discover that the institution provides anything which can be appropriately denominated a course of teaching. Its members must be men who have both learnt and effectively practised their profession before they join. I do not doubt that membership is accompanied with a certain amount of prestige which may prove to be of service to the member in his professional career; but I believe that the same result would attend membership of any society which effectively promoted a branch of science intimately connected with the profession or business in which the member was engaged.

That there is a science of civil engineering, and that its development is of the utmost consequence to our national interests, are to my mind propositions not admitting of dispute. I would not for a moment suggest that a society which devotes its funds to giving concerts for the entertainment of members and their friends, promotes the science of music, or that the cause of literature is advanced by the establishment of a reading room for subscribing members. The main, if not the sole object of such societies is to amuse or instruct individual members. But I can discover no real analogy between societies of that kind and the Institution of Civil Engineers. The discussion of mechanical and engineering problems, by the members of the institution, cannot fail to elicit information and speculation of value to the profession at large, and of advantage to all interested in the various departments of the science, for whose use everything read or spoken by members is recorded in the printed minutes, and constitutes a substantial addition to the sum of human knowledge. It occurs to me that, if any one were asked to say what would be a more efficient method of

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promoting engineering science than that which the institution has adopted, he would have difficulty in making a satisfactory reply.

I have accordingly come to the conclusion that the income of the institution is, in fact, applied, not for the professional ends of individuals, but for "the promotion of science" in the proper sense of the words; and in that view, I entertain no doubt that such income is "legally appropriated" within the meaning of the Act, because the purposes to which it is applied are the same with those prescribed by the charter of incorporation. I have not thought it necessary to dwell upon the first of these points, because I entirely concur in the judgments delivered by Lord Esher and Fry L.J. in the Court of Appeal. The order appealed from ought, in my opinion, to be affirmed, with costs, and I move accordingly.

LORD MACNAGHTEN:—

My Lords, I do not think that the reported decisions on the construction and effect of the Act of 1843 throw any light upon the question now before your Lordships. The Act of 1843 was in relief of existing liability to local rates. Exemption from local rates involves an additional burden on a limited area. It means a tax on immediate neighbours, some of whom may be little better than actual paupers. A privilege so invidious was naturally confined within narrow limits. It was confined to societies established exclusively for the purposes of science, literature, or the fine arts. The word "exclusively," as Lord Campbell observes in one of the earlier cases (1) is, "anxiously introduced, both into the preamble and the enactment." That is the first condition of exemption under the Act of 1843. The next is, that the society must be "supported wholly or in part by annual voluntary contributions." This provision has given rise to much difference of judicial opinion. But if I am not mistaken, the result of the later authorities favours the view suggested by Lord Campbell in the following passage: "The legislature may have intended to throw an additional burden on the other ratepayers of the parish, by exempting from rateability property

(1) 16 Q. B. 491.

before rateable, only where it is occupied for the purposes of a society supported in part by charitable donations and not by payments made with a view to the personal accommodation and advantage of the members, although the object of their pursuits may be the cultivation of science, literature, or the fine arts" (1). So that to bring itself within the exemption a society must have no purpose besides those specified in the Act, and must also, in some degree, partake of the character of a charitable institution. On these two conditions all the cases decided under the Act of 1843 seem to have turned. Neither the one nor the other is required as a condition of exemption by the Act of 1885. The duty granted by that Act was imposed on property belonging to bodies corporate or unincorporate, in order to compensate the revenue for their immunity from death duties. It was a new tax levied for Imperial purposes. As might be expected, the range of exemption is much more extensive. The conditions are far more liberal. The two Acts differ widely in their scope; and even when they happen to deal with the same subject the wording is not the same. It was argued indeed that the language was "practically identical;" but that expression to my mind involves an assumption that the meaning is the same and an admission that the language is different. I do not therefore propose to trouble your Lordships with any further reference to the numerous decisions which were cited in the course of the argument, beyond observing with regard to the case of *Reg.* v. *The Institution of Civil Engineers* (2) that, while I entirely agree in the conclusion, I have some difficulty in accepting the propositions and following the reasoning on which the conclusion is based.

In the present case the Crown seeks to charge the property of the Institution of Civil Engineers by virtue of sect. 11 of the Act of 1885. The institution claims exemption under sub-sect. 3 on the ground that its property and income are legally appropriated and applied for the promotion of science. The first question is, what is the meaning of the word "science" in that sub-section? I see no reason why it should be confined to pure or speculative science. The expression plainly includes applied science, and it was intended, I think, to denote a particular

(1) 3 E. & B. 428. (2) 5 Q. B. D. 48.

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branch of science, as well as universal science or science generally. If it be at all material the word "science" in the Act of 1843 appears to have been construed in the same way. I cannot therefore doubt that mechanical science, as employed in civil engineering, is science within the meaning of the exemption contained in sect. 11 of the Act of 1885.

That being so, the question at issue may be stated shortly. Is the property of the Institution of Civil Engineers legally appropriated and applied for the promotion of the science of civil engineering, or is it legally appropriated and applied for the benefit of civil engineers in order to enable them to practise their profession to greater advantage? It cannot I think be doubted that the institution has raised the standard of the profession, and that to a civil engineer it is of advantage and probably of pecuniary advantage to be a member. But is that result the purpose of the society, or is it an incidental, though an important and perhaps a necessary consequence of the way in which the institution does its work in the pursuit of science?

The charter and bye-laws define the purpose of the institution as being "for the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer." I cannot see any reason to doubt that the eminent men who founded the institution, and who obtained its charter from the Crown, were perfectly sincere in describing the objects which they set before them. They professed to be zealous in the interests of science; why should it be assumed or suspected that their real purpose was the advantage of their own craft? It may be that the advancement of the interests of the profession of civil engineering is inseparably bound up with the advancement of mechanical science. Probably the founders of the society were not insensible of the advantages which such an institution was likely to confer upon its members in their professional capacity. That would have been a formidable objection if the language of the Act of 1885 had been the same as that of the Act of 1843. But under the Act of 1885, in the case of a scientific institution, the only question is whether the property sought to be charged is legally appropriated and applied for the promotion of science. If it is, it seems to me that the exemption must hold

good, although the institution to which the property belongs may serve another purpose as well.

Now, I think it is clear that, according to the true construction of the charter, the property of the institution is dedicated to the promotion of science. Is it in fact so applied? It seems to me that the society has loyally adhered to the declared objects of its charter. There was, I think, much force in the observation which was made by one of the learned counsel for the respondent, that, in the present state of knowledge, advance in mechanical science is only to be expected from conferences of specialists—from the interchange in friendly rivalry of the ideas of the most highly-trained, the most ingenious, and the most experienced members of the profession. That is the method by which this society pursues its professed object. The council every year invite original communications on various specified subjects, and on other questions of professional interest. For communications of adequate merit premiums are awarded, which for the most part are open to any person of any country, whether he be a member of the institution or not. During the session, which extends over six months in each year, there are weekly meetings of the society, at which every member is at liberty to introduce a stranger. At these meetings papers selected from communications received in response to the invitation of the council are read and discussed, the discussions often lasting over several evenings. In order to facilitate discussion proof copies of the papers intended to be read are supplied to any persons, whether members or not, who are supposed to be specially conversant with the particular subject. A shorthand note of the discussion is taken, and after due correction printed in the "minutes of proceedings" for the year, together with the papers read at the weekly meetings, and communications from persons interested in the subjects discussed who may have been unavoidably absent during the discussion. The "minutes" also contain other selected papers and a summary of information gathered from the transactions of foreign engineering societies and from foreign scientific periodicals on all branches of professional knowledge, so as to form a record from year to year of the progress of engineering science. There are, besides, occasional lectures delivered by men of eminence on "the principles involved in the action of the great sources of

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power in nature and their practical application," which are afterwards published in separate volumes.

The "minutes of proceedings" are not on sale to the public, but they are not a sealed book. Copies are sent to every member, and copies are also presented to other institutions and public libraries at home and abroad, so that the information contained in them is practically accessible to any person who may wish to avail himself of it.

The principal part of the expenditure of the society is incurred in the production of the "minutes of proceedings," and in connection with the lectures, and in the maintenance of the library of the institution, which contains a large and valuable collection of scientific works. The rest of the expenditure goes in establishment charges and other matters of that sort. Substantially, as it seems to me, the whole of the society's income is applied to the promotion of science.

My Lords, I cannot conceive in what better way the promotion of mechanical science, and in particular of those branches of mechanical science which lie within the province of civil engineering, could be effected. I cannot doubt that by means of the discussions on the papers read at the ordinary meetings of the society much new light has been thrown on scientific questions and much knowledge, which would otherwise have perished, has been preserved. I see no trace of a selfish or illiberal spirit in the proceedings of the society, nor do I find anything to lead me to suppose that its property and income are applied otherwise than *bonâ fide* for the promotion of science. The action of the society may incidentally benefit the profession to which its members belong—I have no doubt that is so—but I agree with the Master of the Rolls in thinking that "that which this society does is something higher and larger than the mere education of students and others for the profession of civil engineer."

I think the appeal should be dismissed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 1st August 1890.

Solicitor for appellants: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Radcliffes & Cator.*

[PRIVY COUNCIL.]

MONTAIGNAC . . . . . DEFENDANT;

AND

SHITTA . . . . . PLAINTIFF.

J. C.*
1890
July 15, 17.

ON APPEAL FROM THE SUPREME COURT OF LAGOS.

Principal and Agent—Authority of Agent to Borrow—Liability of Principal where Agent exceeds his Authority.

Where an agent under his power of attorney possessed implied authority to raise money by loan for the purpose of carrying on the business affairs entrusted to him, which authority under circumstances of emergency must be deemed to include power to borrow on exceptional terms outside the ordinary course of business:—

Held, that the lender was not bound to inquire whether in the particular case the emergency had arisen or not, but that he was entitled to recover from the principal if he lent to the agent bonâ fide and without notice that the agent was exceeding his mandate.

APPEAL from an order of the Supreme Court (May 25, 1889) affirming an order of the Divisional Court (March 26 and April 30, 1888).

The action was brought by the respondent against the appellant, as chief agent for Cyprien Fabre & Co., to recover £7200, of which £6000 was principal, lent by the respondent to one Del Grande as agent of that firm, and £1200 for interest thereon.

The question in the appeal was whether Del Grande had authority to borrow money on the firm's account upon the terms and rates of interest agreed upon.

Finlay, Q.C., and *H. Tindal Atkinson*, for the appellant, contended that the firm which he represented was not liable. The respondent did not lend the money claimed to Del Grande in the ordinary course of mercantile business. Further, he lent it under such circumstances that he ought reasonably to have known or suspected that Del Grande was not borrowing on behalf of Cyprien F. Fabre & Co. Even if authority to borrow under

* *Present.*—LORD WATSON, LORD HERSCHELL, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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the circumstances were established, still it did not extend to authorize the terms alleged or the rate of interest agreed upon. [Reference was made to *Sinclair, Moorhead & Co.* v. *Wallace & Co.* (1), and *Hawtayne* v. *Bourne* (2).]

Jeune, Q.C., and *Patrick Evans*, for the respondent, contended that Del Grande was duly authorized to borrow, and that his contract bound the firm. No fraud or collusion was proved; and in the absence of fraud it was immaterial whether Del Grande acted honestly by his principal or what rate of interest he contracted to pay. The respondent had no notice that Del Grande was acting improperly or was exceeding his instructions. He was not bound to inquire whether circumstances had arisen to render the transaction prudent in the interests of Del Grande's principals. The agent had authority to decide as to that; and if the transaction was not justified by the circumstances, he must account to his principal for his acts.

Finlay, Q.C., replied.

1890 *July* 17.

The judgment of their Lordships was delivered by

LORD HERSCHELL:—

This is an appeal from the Supreme Court of the colony of Lagos, the sole question raised being whether the respondent can enforce as against the appellants a loan which he made through an agent purporting to be acting on their behalf.

On the 6th of November, 1878, the appellants, Cyprien Fabre & Co., gave a power of attorney to Mr. Settimio Carrena, who was then residing at Lagos, to manage and administer in the name of the house of Cyprien Fabre & Co. all the business of the house in the establishments which it possessed on the West Coast of Africa between the Cape St. Paul and the mouth of the River Benin. It is not necessary to read the other terms of the power, which was very wide in its scope. It enabled the mandatory to substitute another in his place for the purposes of the power. Accordingly, on the 4th of June, 1879, Settimio Carrena transferred all the powers given him by Cyprien Fabre & Co. to

(1) 7th Court of Sessional, 4th Series, p. 874. (2) 7 M. & W. 595.

Giuseppe del Grande in the same manner as if the power had been originally given to him direct. Under that authority Del Grande for some years acted as agent for the house of Cyprien Fabre & Co. in the colony of Lagos. Their business consisted in the working of certain factories, and also in the import and export of produce. The entire management of the business carried on appears to have rested with Del Grande. It is not disputed that the power to manage and administer the business conferred some authority to raise money, inasmuch as the raising of money was necessary for the proper carrying on of the business affairs which were to be administered by the agent. Their Lordships think it cannot be doubted upon the evidence that the agent had authority to raise the moneys that were necessary for the purpose of the business, and to employ for that purpose all ordinary means.

It is contended on the part of the appellants that the power to borrow was restricted to the borrowing by certain means which have been suggested. It is admitted that he could borrow or raise money by selling drafts to persons desirous of remitting to Europe. It is clear that this was not the limit of his borrowing power according to the actual practice which prevailed, inasmuch as he borrowed the money needed from time to time from another merchant or merchants, repaying it either by cash or by handing over to them produce to the requisite amount. As far as appears in those mutual borrowing transactions which seem to have taken place from time to time between the merchants, the loan was made without requiring the payment of any interest. The appellants contend that, conceding all this, the transaction which took place between the respondent and Del Grande was so far out of the ordinary course of business at Lagos that the loan made by the respondent to Del Grande cannot properly be charged against his principals. It appears that Del Grande communicated to the respondent, who is a native merchant and apparently to some extent a financier, the fact that he would be wanting some £6000 for the purpose of his factories. The respondent does not appear to have thoroughly understood the English language, or to have been able to read it. The £6000, according to the evidence of the respondent, was not all to be

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lent in the first instance; but he was told that it would be required from time to time; and accordingly on the 22nd of January, 1884, and at various dates down to the 14th of October in that year, the respondent made in all eight payments to Del Grande, in sums either of £1000 or £500, amounting in all by the 14th of October to £4500. On the 20th of July, 1885, a further sum of £300 appears to have been advanced. On all those prior occasions, as well as on this occasion of the 20th of July, 1885, a document forming an acknowledgment of the receipt of various sums advanced was given by Del Grande to the respondent. These documents were in the terms "good" for the particular amount, £500 or £1000, as the case might be, and bore the name of Cyprien Fabre & Co., being signed by Del Grande as agent for the firm. On the last occasion to which allusion has been made, the 20th of July, 1885, although £300 only was paid in cash, a "bon" was given for the sum of £1500, the explanation being that down to that time, although the advances had commenced in January, 1884, no interest had been paid, and £1200 of that sum of £1500 was advanced for the purpose of enabling the liability for interest then accrued to be discharged, and consequently the transaction was dealt with as if there had been a loan, which it is said there practically was, of £1500 on that date, making in all £6000. On the 1st of August, 1887, a document was signed by the respondent which appears to have been prepared by Del Grande. It stated that it had been agreed as follows: "Mr. Shitta gives to Mr. Del Grande, agent of C. F. Fabre & Co., the sum of six thousand pounds sterling (£6000) with interest. Mr. Del Grande obliges himself to pay to Mr. Shitta the rent of £1800 per annum (one thousand eight hundred pounds) sterling. Mr. Del Grande must liquidate this part, and render £6000 to Mr. Shitta before his departure for Europe," and then underneath there is the statement of the various sums advanced, amounting in all to £6000, followed by these words: "I, the undersigned, declare to have received of Mr. Del Grande the rent of £1800 per annum from the 16th of January, 1884, until this day, 31st July, 1887. Lagos, 31st July, 1887." It would at first sight appear as though £1800 per annum had been paid year by year as from January, 1884, down

to July, 1887, and if an arrangement had been in fact come to that £1800 per annum should be paid, whatever the amount advanced from time to time, and however far it might fall short at any time of £6000, the case would have worn a very different aspect. But it appears on the evidence that this document prepared by Del Grande and submitted to the respondent for his signature, if it is to be understood as representing that that sum had been paid annually during that term of years, did not represent the fact. Down apparently to the date of this agreement, Mr. Shitta, the respondent, had received no interest except the £1200 which he received out of the £1500 advanced in July, 1885. He had received an assurance that some payments which were about to be made by a Mr. Barth for sums approaching £2000 were to be treated as being interest on this loan, and that he was, when he had received those payments, to treat all the interest down to the 30th of July, 1887, as wiped off, and the transaction standing between them as a loan then due of £6000, which was to bear interest at the rate of £1800 per annum. It should be observed that the total amount received or treated as received, in respect of interest, from January, 1884, down to the 31st of July, 1887, does not exceed, but is rather less than, interest at the rate of £1800 a year on £6000, if applied to the various sums from time to time received by Del Grande and paid by the respondent.

The question to be considered is, whether the transaction to which allusion has been made was a borrowing so far outside the ordinary course of dealing in the colony of Lagos, by a firm who were under the necessity of raising funds, as that it ought to be treated and ought to have been understood by a lender to be out of the course of business. It may be that if fuller inquiry and investigation had been made than was the case, it would have appeared that this was so. On the other hand, fuller investigation might have shewn that the condition of the colony of Lagos, the facilities for raising money, the interest which had to be paid where money was needed and parties were not wishful to remit bills to Europe, would have rendered a resort to these means of raising money not unusual or extraordinary. But in the absence of any such investigation, beyond that which is

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afforded by the evidence, their Lordships do not feel that it is possible for them to reverse the conclusion of fact at which both Courts below have arrived, for in truth the only question arising upon this appeal is one of fact. If in the absence of the means of raising money needed for a business by the sale of bills, or by obtaining accommodation from some other merchant with whom the house had transactions, an agent who had to raise money for his firm must have had recourse to one of these native financiers or money-lenders, then in the opinion of their Lordships the power which this agent possessed under his mandate from his principals would authorize his borrowing from such a source under such circumstances; and if the occasion might have arisen on which his borrowing powers would have been properly interpreted as comprising the recourse to such means as these, then their Lordships do not think it was incumbent upon the lender to inquire whether in the particular case the emergency had arisen or not; but if he, in good faith and without any notice of the fact that the agent was not obeying or intending to obey the mandate of his employers, advanced money to him, the loan would be one by which, having regard to their authority to their agent, they would be bound, and he would be entitled to recover.

Under these circumstances, their Lordships will humbly advise Her Majesty that the judgment appealed from be upheld and the appeal dismissed. The appellants must pay the costs of the appeal.

Solicitors for appellant: *Murray, Hutchins, & Stirling.*
Solicitor for respondent: *H. Foster Smith.*

[PRIVY COUNCIL.]

RAILTON . . . . . PLAINTIFF;

AND

WOOD . . . . . DEFENDANT.

J. C.*
1890
May 16;
June 28.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Insolvent Act, s. 41—Bill of Sale—Distress for Rent—Right of Landlord.

Held, that according to the true construction of New South Wales Insolvent Act (5 Vict., No. 17), s. 41, the prohibition of "distress for rent" after sequestration of the tenant's estate does not authorize the holder of a bill of sale to take his goods (the subject of such bill) out of the hands of the landlord's bailiff in possession thereof under such distress.

APPEAL from an order of the Supreme Court (Nov. 27, 1888), directing that a verdict entered for the appellant should be set aside, and that a verdict be entered for the respondent, and from another order (Nov. 30, 1888) discharging a rule to increase the appellant's damages to £1067 2*s.*, being both damages and costs, according to sect. 18 of 15 Vict., No. 11.

The action was brought by the appellant against the respondent and another, since deceased, for wrongfully rescuing a distress, conversion, and money received.

The facts are stated in the judgment of their Lordships.

Aspland, Q.C., and *Dickens*, for the appellant.

Cohen, Q.C., and *Wood Hill*, for the respondent.

The cases cited were *Brocklehurst* v. *Lawe* (1) and *Cohen* v. *Slade* (2).

* *Present*:—THE EARL OF SELBORNE, LORD WATSON, LORD FIELD, and SIR BARNES PEACOCK.

(1) 7 E. & B. 176.

(2) 12 N. S. W. Rep. 88.

J. C. 1890 RAILTON v. WOOD.

1890. June 28. The judgment of their Lordships was delivered by

LORD FIELD:—

This appeal is brought before their Lordships from two orders of the Supreme Court of New South Wales, but in both cases the same question, viz., the construction of the 41st section of the Colonial Insolvent Act, 5 Vict., No. 17 of 1841, is raised.

The material facts are not in dispute.

The appellant, who was the plaintiff below, is the owner of the Telegraph Hotel, at Inverell, New South Wales.

It was in lease to one Gorman, and at the beginning of August, 1887, the sum of £332 18*s.* 4*d.*, being more than six months' rent, was in arrear.

For that arrear the appellant, on the 2nd of August, distrained upon all the goods in the hotel, and afterwards impounded and made an inventory of them in due course.

Upon the same day a man named Bell, by the authority of the respondent, also entered and claimed possession of the goods.

On the 4th of August Gorman, the tenant, having committed an act of insolvency, his estate was placed under sequestration under the Insolvent Act above mentioned; but beyond giving the appellant notice of the sequestration and of his appointment as official assignee, the latter in no way intervened or interfered with the appellant's distress.

On the 8th of August the respondent forcibly and against the will of the bailiff (the goods being still impounded) removed them from the premises; and on the 11th of August the present action was brought for that pound breach and removal, under the colonial statute, 15 Vict., No. 11, by virtue of sect. 18, of which the appellant claims to be entitled to treble damages.

The case was tried before His Honour the Chief Justice of New South Wales and a jury.

The above facts were given in evidence, and it also appeared that the respondent claimed to justify what he had done upon the ground that the goods had become his property under a bill of sale executed by the tenant, and dated the 7th of May previous to the distress.

By that deed (the validity of which was not disputed) the goods in question were assigned to the respondent by way of mortgage for securing an advance of £1800.

The deed also comprised the licences, goodwill, and lease of the hotel, and contained the usual clauses assuring to the tenant quiet enjoyment until default, and giving to the mortgagee power to seize and sell in that event.

The value of the goods was put by the appellant at something more than £1000, and by the respondent at £600.

It did not appear what sum was due upon the mortgage; but it seems to their Lordships to have been assumed below and to be in accordance with the probabilities of the case that the sum secured was far in excess of the value of the security, and that there was therefore no beneficial interest in the goods vested in the tenant, and that the whole property was in the respondent.

Upon these facts the learned Chief Justice directed a verdict for the appellant for single damages, £355 15*s.* 4*d.*, but reserved leave to her to move to increase the amount as the Court might direct, and to the respondent to move to enter the verdict for him.

Under this leave cross rules were obtained, and after argument the respondent's rule was made absolute and the appellant's discharged, and it is in both these respects that the appellant complains.

The argument below and at their Lordships' bar was properly directed to the only material question in the case, which is, whether the respondent was justified in taking the goods out of the possession of the appellant's bailiff after the order for sequestration. The 41st section of the Colonial Insolvent Act, 5 Vict., No. 17, is in these words: "That no distress for rent shall be made or levied or proceeded in after any order made or sequestration as aforesaid; but the landlord or party to whom the rent shall be due shall be entitled to receive out of the assets of the estate so much rent as shall be then due, not exceeding six months' rent in the whole, and shall be allowed to come in as a creditor and share rateably with the other creditors for the overplus."

As to the construction of this section the respondent's

J. C. 1890 HAILTON v. WOOD.

contention was that all further dealing by the appellant with the distress after the making of the order of the 4th of August was prohibited, and that there was therefore no longer any bar to the removal by him of his own goods, whilst the appellant urged that the prohibition only applied to a distress upon goods which formed part of the insolvent estate to be administered as assets, and also that even otherwise the prohibition in question was at the election of the official receiver, and did not justify the pound breach by the respondent.

Upon this latter contention it is not necessary for their Lordships to express any opinion, they having come to the conclusion that the appellant's contention upon the construction of the statute is well founded, and that the judgment of the Court below cannot be supported.

The rules of construction are now well settled. The authorities are numerous; but their Lordships cannot find a more appropriate enunciation of the rule applicable to the present case than that expressed in the judgment of one of their Lordships (Earl of Selborne) and of the late Earl Cairns in the case of *Hill* v. *East and West India Dock Co.* (1), and, on appeal to the House of Lords (2).

The question which arose in that case was whether the 23rd section of the Imperial Bankruptcy Act of 1869, in the case of a bankrupt who was the assignee of a lease, affected the rights and liability of the lessor and original lessee as between themselves, and this is what Lord Selborne says (3):—

"On principle, it is certainly desirable in construing a statute, if it be possible, to avoid extending it to collateral effects and consequences beyond the scope of the general object and policy of the statute itself, and injurious to third parties, with whose interests the statute need not and does not profess to directly deal. In many cases . . . . the effect of the statute, if it were construed according to the appellant's argument, would be to do a great deal more harm to third parties outside the administration of bankruptcy than it can do good to anybody else."

On appeal to the House of Lords, Lord Cairns says, at p. 454:—

(1) 22 Ch. D. 14. (2) 9 App. Cas. 453. (3) 22 Ch. D. 23.

"It is said that the 23rd section of the Act of 1869 produces this result, and I admit freely that the section seems to me capable of that construction. No doubt, if you read it literally, it does seem to provide that, 'when any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, the trustee may by writing under his hand disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a lease, be deemed to have been surrendered.' . . . .

"It is possible that that may mean that, to all intents and purposes, as between all persons, persons actually concerned in the bankruptcy and those not so concerned, it shall be a surrendered lease, and shall be altogether out of the case. But, on the other hand, is that the only interpretation? . . . . Now, ... the purpose of this section, and indeed the purpose of the whole statute, is, in the first place, to clear and discharge the bankrupt in cases where it is proper that he should be discharged from liability; in the next place, to facilitate as early as possible the distribution of the property which is to be divided among the creditors, and the winding up of the bankruptcy; and, in the third place, to protect the trustee from any liability to which he might be subject, and to which he ought not to be subject beyond what is necessary for the purpose of accomplishing the two prior objects. If, therefore, the statute can admit of any construction limited to these particular objects, we must consider whether that is not a construction preferable to the first to which I have referred."

And a little further on, Lord Cairns says: "Where there are two constructions, the one of which will do, as it seems to me, great and unnecessary injustice, and the other of which will avoid that injustice, and will keep exactly within the purpose for which the statute was passed, it is the bounden duty of the Court to adopt the second and not to adopt the first of those constructions."

Now, applying these principles to the present case, what do their Lordships find?

The language of the statute in describing what it is which it is intended to prohibit, "distress for rent," is so general as to

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require (as indeed was admitted on both sides at the bar) some limitation in order not to lead to consequences apparently absurd or unjust.

What and whose rent? From and to whom due? What and whose goods? All goods on the premises liable to be distrained by the insolvent's landlord, no matter whose property they are, or only those goods which form part of the estate to be administered?

Both of the latter constructions are within the language of the section, and in order to ascertain which is to be preferred, their Lordships must look at the provisions of the statute and its purview and policy.

Now it is a statute, as described in the preamble, for "giving relief to insolvent debtors, and providing for the due collection, administration, and distribution of insolvent estates," and it contains all the usual series of provisions apt to carry those objects into effect, amongst them the 41st section finds in that view its appropriate place, and no section was pointed out to their Lordships dealing with the rights and liabilities of third parties, except when they come into competition with and affect the rights of creditors.

The special policy of the statute is also in harmony with the established policy of legislation in bankruptcy or insolvency, which aims at placing limitations upon the exceptional remedy of the landlord when it comes into competition with the interests of the general body of creditors, and the special language of the section points to that policy in the present instance.

It places a limit upon the undoubted legal right of the appellant to a preferential hold upon specific property which was amply sufficient to meet her claim, and it substitutes for it a payment of the rent in full for six months, leaving her to her right of proof for the rest; but inasmuch as the payment in full is to come out of the assets of the estate, the reasonable inference is that the remedy taken away was one which was in force as against the estate, and not against the goods of a third party, who, if the respondent's contention is correct, would take all the benefit of the limitation of the remedy, and contribute nothing to the substitute.

Again, the respondent's construction would tend to throw upon the insolvent estate a liability to pay six months' rent in full out of assets which would not in any way arise from the abandonment to the estate of any equivalent.

It appears to their Lordships, therefore, that to read the prohibition as affecting a distress of goods the property of a third party would be extending it beyond the scope of the general object and policy of the Act, and injurious to the landlord's rights.

For what is the legislature supposed to do in that case?

It is supposed to have interfered with the appellant's legal right of distress, to have rendered useless to her all the expenses incurred before the order for sequestration, and, whilst shewing an intention to give her a substitute, which might not unreasonably be supposed to be adequate having regard to general policy, viz., payment in full of six months, it has limited that right to payment "out of assets," which in such a case as the present, where a bill of sale holder has swept all tangible property into his security (and they are frequent), would render the substitute absolutely futile.

Of the two possible constructions, therefore, their Lordships prefer that which does not extend the operation of the statute to collateral effects and consequences beyond its general objects and policy, and injurious to the landlord, with whose interests in competition with those of a bill of sale holder the statute has not and does not propose directly to deal.

The view which their Lordships thus take is strongly supported by the decision of the Court of Queen's Bench in this country in the case of *Brocklehurst* v. *Lawe* (1).

It is true, as pointed out by the Court below in the present case, that in the statute which was in *Brocklehurst* v. *Lawe* (1) the subject of construction the distress was expressly stated to be one levied "upon the goods or effects of any bankrupt," and that one of the learned judges who decided that case adverted to that circumstance in the course of the argument.

But the expression of these words does not form the ground of the decision, which rested upon the broad principle of construction to which their Lordships have already adverted.

(1) 7. E. & B. 176.

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The judgment of the Court in the present case does not appear to their Lordships to have rested upon any construction put by the Court itself upon the statute. Their judgment appears to rest almost entirely upon the authority of a prior case of *Cohen* v. *Slade* (1), and decided in the Supreme Court, New South Wales, in 1871.

But that case cannot, in their Lordships' view of the true principle of construction to be applied, be regarded as an authority to be followed; and their Lordships are also unable to agree in the view taken by the Court below, that that decision had become so incorporated with the general law and practice of the Colony as to lead to the reasonable belief that it had been acted upon so as to render it desirable to uphold it.

For these reasons their Lordships will humbly advise Her Majesty to reverse the judgments of the Supreme Court of New South Wales, to discharge the respondent's rule to enter the verdict for him, and to make absolute the appellant's rule to enter judgment for her, with treble damages, and all costs below.

The respondent must pay the costs of this appeal.

Solicitors for appellant: *Spyer & Son.*

Solicitors for respondent: *Arnold, Fooks, Chadwick, & Co.*

(1) 12 N. S. W. Rep. 88.

[PRIVY COUNCIL.]

O'ROURKE, AND ANOTHER . . . . PLAINTIFFS; J. C.*

AND 1890

THE COMMISSIONER FOR RAILWAYS . DEFENDANT. *May* 15, 16, *June* 28.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Verdict in pursuance of an Award—Costs—Powers of Court and Taxing Master.

Where by a consent decree arbitrators were directed to return a general award on the whole declaration for a sum certain, and such award was thereby directed to be entered as a verdict whereon final judgment might be signed, and costs of the action, reference, and award were directed to follow the verdict so entered:—

Held, that, the appellants having thereunder obtained a verdict for a portion of the sum claimed by them, which verdict carried costs as above directed, the Court could not give the respondent a verdict for the residue of the sum claimed, and then delegate to the Taxing Master the duty of ascertaining, by the evidence of the arbitrators and others, as to what parts of the appellant's claim the respondent had succeeded, with a view to the apportionment of costs:—

Held, further, that such evidence would be inadmissible as tending to explain or contradict the award.

Duke of Buccleuch v. *Metropolitan Board of Works* (Law. Rep. 1 H. L. 418) followed.

APPEAL from an order absolute (Sept. 10, 1888) of the Supreme Court.

The order was made on motion by the appellants for a rule absolute directing the prothonotary to review the principle of taxation of the appellants' costs as decided by him; and upon cross motion by the respondent for a rule calling on the appellants to shew cause why the award in the case should not be in part set aside and referred back to the arbitrators.

The circumstances are stated in the judgment of their Lordships.

The Court held that the issues in the case were divisible, and

* *Present*:—THE EARL OF SELBORNE, LORD WATSON, LORD FIELD, and SIR BARNES PEACOCK.

J. C. 1890 O'ROURKE v. COMMISSIONER FOR RAILWAYS.

that according to the practice, as laid down in English cases and followed in *Little* v. *Sandeman* (1), the respondent was entitled to the costs of the issue on which he had succeeded, and that to enable the prothonotary to tax the costs upon that footing the postea ought to be amended by entering a verdict for the appellants for £20,433, and for the respondent for £79,566, being the residue of the appellants' claim. Further, that the prothonotary might, by the evidence of the arbitrators and others, satisfy himself as to what were the parts of the claim on which the appellants had failed.

The Attorney-General (Sir *R. Webster*), and *E. Pollock*, for the appellants, submitted that this judgment was erroneous. By the terms of the order of reference the award was to be entered as the verdict, and the costs were to follow the verdict and be taxed in the ordinary way. Those costs included costs of the action of and incidental to the arbitration and of the award. The order was made by consent, and amounted to an agreement that the costs should be disposed of in one way, i.e., they should follow the verdict. The award was conclusive. No evidence was admissible to explain or contradict it. The Court had no jurisdiction after the award was found in favour of the appellants to enter a verdict for the respondent for any amount and then apportion the costs according to the two verdicts.

[Reference was made to *Wilcox* v. *Wilcox* (2); *Crawshaw* v. *York and North Midland Railway Company* (3); *Traherne* v. *Gardner* (4); *Anderson* v. *Chapman* (5); *Whitworth* v. *Hulse* (6); *Little* v. *Sandeman* (1); *Duke of Buccleuch* v. *Metropolitan Board of Works* (7).]

Reid, Q.C., and *Leverson*, for the respondent, contended that although the order of reference empowered the arbitrators to return a general verdict, still the issues were divisible, and that upon some of them the arbitrators must have found for the respondent, having regard to the amount which they awarded

(1) 1 N. S. W. L. R. 263.
(2) 4 Ex. 500.
(3) 21 L. J. (Q.B.) 274.
(4) 8 E. & B. 161.
(5) 5 M. & W. 483.
(6) Law Rep. 1 Ex. 251.
(7) Law Rep 5 H. L. 418.

against him, and which was much less than the amount claimed. According to the usual practice, the respondent was entitled to his costs of the issues on which he succeeded. There was nothing in the terms of the order of reference to deprive him of that right. He was entitled to his costs on a true interpretation of the order, and in accordance with the intention of the parties. In order to tax costs in this case properly, it was in accordance with the usual practice and the decisions of the Courts, that the postea should be amended as ordered, and that the prothonotary should examine the arbitrators and take other evidence so as to ascertain upon which issues the respondent had succeeded.

[Reference was made to *Traherne* v. *Gardner* (1), and *Williams* v. *Great Western Railway Company* (2).]

Counsel for the appellants were not heard in reply.

1890
June 28.

The judgment of their Lordships was delivered by

LORD WATSON:—

The appellants constructed part of a railway line, under a contract with the respondent, who is the Commissioner for Railways for New South Wales; and, disputes having arisen as to the payments to which the appellants were entitled, they brought an action against the respondent before the Supreme Court of the Colony. Their declaration, which contains two counts on an indenture, one in damages and a fourth in indebitatus, concludes for a lump sum of £100,000. In the course of the litigation they furnished particulars of their claim for goods sold and delivered, amounting in all to £39,799 5*s.* 1*d.*; but there is no specification in the pleadings of the sums claimed under the other counts of the declaration. The respondent's answer consisted of a general denial of all the appellants' allegations; and the appellants joined issue on his pleas.

When the cause was ripe for trial, the parties agreed to refer it, and all matters therein in dispute between them, to the determination of three arbitrators, the award of a majority to be final and conclusive. The terms of the arrangement were embodied in a decree by consent, bearing date the 22nd of December,

(1) 8 E. & B. 161.
(2) 8 M. & W. 856.

J. C. 1890 O'ROURKE v. COMMISSIONER FOR RAILWAYS.

1886; and these, so far as material to the issues raised by this appeal, are as follows: "*The award of the said arbitrators to be for a sum certain for the plaintiffs, or an award for the defendant, as the arbitrators may find;* such award to be made within one calendar month from the close of the said arbitration, to be made in writing, and when made to be delivered by the said arbitrators to the prothonotary of the Supreme Court; and that, unless restrained by any order or rule of the Supreme Court or judge thereof, the party in whose favour the said award shall be made may, twenty-one days after the service of a copy of the said award on the solicitor or agent of the other party, *enter the said award as the verdict in this cause, and shall be at liberty to sign final judgment thereon,* the arbitrators to assess their fees at the foot of the award; *the costs of this action, and of the arbitration, and of and incidental to the reference to arbitration, and of the award, to follow the verdict so to be entered and to be taxed in the ordinary way.*"

The arbitrators differed in opinion, and a majority signed and delivered their award on the 10th of September, 1887, by which they awarded the sum of £20,433 10*s.* 11*d.* to the appellants, and assessed the fees of the three arbitrators at £1,804 5*s.* each. No application was made to set aside the award within the time prescribed, and, in terms of the decree already cited, a verdict was entered for the appellants, on the 11th of October, 1887, for the sum found due to them by the award with interest from its date, by signing an incipitur of judgment.

The appellants then brought in their bill of costs for taxation, which included the whole costs of the action and arbitration, and incidental thereto, and also of the award. The amount of the bill was £22,983 15*s.*, which is a large sum; but the proceedings appear to have been complicated and expensive, judging from the fees of the arbitrators, which constitute nearly one-fourth of the whole. When the bill of costs came before the prothonotary, the respondents objected to the principle on which it was drawn up, and maintained that the appellants were not entitled to claim costs in respect of the issues upon which they had presumably failed. After hearing parties and considering the matter, the prothonotary, on the 2nd of November, 1887, issued an order

adjourning the taxation until the 21st of the month, "so as to give the defendant time to bring in his costs for taxation on the issues on which he has, in my opinion, succeeded." It is hardly necessary to observe that the matter, with which the taxing officer thus assumed that he had the right to deal, was one wholly beyond his jurisdiction. It involved no question of taxation, but of the respondent's right to have a verdict entered for him which would carry costs.

In consequence of the course taken by the prothonotary, the appellants moved for a rule absolute in the first instance, directing him to review the principle which he had adopted in taxing their costs. The respondent, on the other hand, moved for a rule to shew cause why the award should not be set aside, in so far as it omitted to find the several issues joined between the parties, and to specify the items and claims of the appellants which were disallowed by the arbitrators, and also why the award should not be sent back to the arbitrators, as to the matters so omitted, for such findings as might be necessary for the just and proper taxation of costs between the parties. These motions were heard together before a full Court, who gave effect to neither of them. The learned judges ordered the postea to be amended by entering a verdict for the appellants for £20,433 10*s.* 11*d.*, and a verdict for the respondent for £79,566 9*s.* 1*d.*, being the residue of the appellants' demand, and declared "that it will be competent for the prothonotary of this Court, on the taxation of the plaintiffs' costs, to satisfy himself by the evidence of the arbitrators herein, or upon such other evidence as may be brought before him, as to what parts of the plaintiffs' claim the defendant having succeeded is entitled to his costs."

The judgment of the Court was delivered by Windeyer, J., who justifies the amendment of the postea by reference to the colonial case of *Little* v. *Sandeman* (1), and the decision of the Queen's Bench of England in *Traherne* v. *Gardner* (2). Their Lordships do not question the soundness of these decisions, which nevertheless appear to them to have no application to the facts of the present case. *Little* v. *Sandeman* (1) was an

(1) 1 N. S. W. L. R. 263.

(2) 8 E. & B. 161.

J. C. 1890 O'ROURKE v. COMMISSIONER FOR RAILWAYS.

action in trover for eight horses. The plaintiff having succeeded at the trial in obtaining a verdict for one animal only, the Court amended the postea by entering a verdict for the defendant in the case of the remaining seven. In *Traherne* v. *Gardner* (1), the plaintiff sued for repayment of copyhold fees paid under protest, there being separate charges applicable to each of several tenements, and, though a general verdict had been entered for the plaintiff, it was taken subject to the opinion of the Court upon a special case. In both instances there were several issues, upon which either the jury or the Court had separately found, and the Court were therefore in a position to amend the verdict according to the success or failure of the plaintiff or defendant upon each issue. But in this case (leaving out of view for the present the fact that the parties had agreed as to the course of procedure which was to be followed) the Court had no materials which could enable it to dissever the issues which had been submitted to the arbitrators, and to ascertain the findings which they had arrived at in regard to each of them. The lump sum claimed by the appellants necessarily included unliquidated damages under the third count of the declaration; and it is clear beyond dispute that, treating the third count as a separate issue, if the appellants got a finding for part of the damages claimed, the respondent would not be entitled to a verdict for the balance. In that state of matters it is difficult even to speculate upon what grounds the learned judges gave the respondent a verdict for the excess of £100,000 over the amount awarded by the arbitrators.

The directions given by the Court to their prothonotary, in the decree appealed from, strongly illustrate the unreliable character of the cost-carrying verdict which they entered for the respondent. They delegate to that official the duty of ascertaining, by examination of the arbitrators and others, "as to what parts of the plaintiffs' claim the defendant having succeeded is entitled to his costs." Such an inquiry is obviously beyond the functions of a taxing officer. The Court itself, and not he, must determine what were the issues raised for trial, and upon which of these, and to what extent, the defendant is entitled

(1) 8 E. & B. 161.

to a verdict. Their Lordships are also of opinion that the Court below erred in authorizing a general examination of the arbitrators "with a view to the prothonotary informing himself as to the issues upon which the defendant succeeded." The judgment of the House of Lords in *Duke of Buccleuch* v. *Metropolitan Board of Works* (1), upon which Windeyer, J., relied, is, when rightly understood, a direct authority to the contrary. The principle which was laid down by Cleasby, B., in that case (p. 433), and accepted by the House, was thus explained (p. 462) by Earl Cairns: "He (i.e. the arbitrator or umpire) was properly asked what had been the course which the argument before him had taken—what claims were made and what claims were admitted; so that we might be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased. The award is a document which must speak for itself, and the evidence of the umpire *is not admissible to explain or to aid*, much less to attempt to contradict (if any such attempt should be made) *what is to be found upon the face of that written instrument.*" In this case it is obvious that an examination of the arbitrators would not disclose how far the defendant had succeeded, unless they were asked what sum, if any, they had awarded to the appellants under each count of the declaration—a line of examination which is plainly incompetent.

The learned judges in the Court below appear to have been influenced by the consideration, thus expressed by Windeyer, J., that "the amount of the plaintiffs' claim and the amount of the arbitrators' award clearly shew that the defendant has made a successful resistance to a considerable portion of the demand made upon him, and, looking to the amount claimed by the plaintiffs' bill of costs, it would be a monstrous thing if the defendant were not allowed such costs as he has been put to in successfully resisting any portion of the plaintiffs' demands." These observations confirm the impression, created by the terms of the order appealed from, that the learned judges throughout these proceedings must have assumed that they were entitled to

(1) Law Rep. 5 H. L. 418.

J. C. 1890 O'ROURKE v COMMISSIONER FOR RAILWAYS

deal with the case in the ordinary course of law, instead of following out the course which the parties themselves had agreed to. But the consent decree of the 22nd of November, 1886, is the only measure of the rights of these two parties; and neither the Court below, nor this board, has any right to disregard the arrangements which the parties have made, or to characterize the result of these arrangements as monstrous. Had it not been for these arrangements, the proper course might perhaps have been to send back the case to the arbitrators for special findings upon each count; but the parties have not only empowered, but have directed them to return a general award upon the whole declaration, for a sum certain, either for the plaintiff or for the defendant, as the case might be. In the next place, the parties have agreed that an award in these terms should, unless challenged within a time limited, be entered as a verdict for the party in whose favour it was made, who should also be at liberty to sign final judgment thereon, and both these steps have been duly taken by the appellants, without any opposition on the part of the respondent. Lastly, it was agreed that all costs of the action, reference, and award should "follow the verdict so to be entered," which plainly implies that the appellants holding the award which they have entered are to have their whole costs as taxed, and that the respondent is not entitled to any award or verdict carrying costs.

For these reasons, their Lordships are of opinion that the course followed by the Court below, whilst in other respects unwarrantable, is in direct contravention of the agreement of parties; and they will therefore humbly advise Her Majesty to reverse the order appealed from, with costs to the appellants in the Court below, from and after the 2nd of November, 1887, and to remit the cause, with directions to the prothonotary to tax the costs of the appellants (plaintiffs in the Court below) upon the verdict entered for them pursuant to the award. The respondent must pay the costs of this appeal.

Solicitors for appellants: *Young, Jones & Co.*
Solicitor for respondent: *Randolph C. Want.*

[PRIVY COUNCIL.]

BARTON . . . . . PLAINTIFF; J. C.*

AND 1890

BANK OF NEW SOUTH WALES . . DEFENDANTS. *July* 15.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Mortgagor and Mortgagee—Absolute Conveyance—Admissibility of Evidence to contract Terms of the Deed.

Where the appellant had deposited with the respondent bank his title-deeds to certain property in order to secure a cash credit, and afterwards executed an absolute conveyance thereof to the bank in pursuance of an agreement recited therein to the effect that the price paid should be by deducting £400 from the amount due:—

Held, that, although collateral evidence was admissible to shew that notwithstanding the plain terms of the deed the relationship of mortgagee and mortgagor still subsisted between the parties, yet in this case it was wholly insufficient to overcome the presumption that the deed of conveyance truly stated the transaction.

APPEAL from a decree of the full Court (June 4, 1888), reversing a decree of the primary judge in equity (Sept. 18, 1885), in favour of the appellant, and allowing him, as administrator of the estate and effects of William Barton, deceased, to redeem the lands in suit which had been conveyed to the respondent by William Barton by an absolute conveyance dated the 20th of July, 1874.

Romer, Q.C., and *Bray*, for the appellant.

Sir *H. Davey*, Q.C., and *Farwell*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

LORD WATSON:—

William Barton, who died in 1881, obtained in the year 1869 a cash credit from the respondent bank for £600, for which he

* *Present*:—LORD WATSON, LORD HERSCHELL, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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granted a personal bond in the usual terms, and at the same time deposited with the bank the title-deeds of three parcels of Crown land, the property which is now in dispute. On the 20th of July, 1874, the principal and interest due upon the cash account amounted to £723 12*s.* 10*d.*, and upon that date the debtor executed an absolute conveyance of the land in question in favour of the bank. The indenture is not a bare conveyance of the legal estate, but embodies the terms of a transaction in pursuance of which the conveyance was made. It narrates that "it has been agreed between the parties hereto that the said William Barton shall convey to the said Bank of New South Wales the three parcels of land hereinafter described in manner hereinafter expressed, and that the said debt shall be reduced by the sum of four hundred pounds," and it is on the express consideration of that agreement having been entered into that Barton proceeds to sell and release and convey to the bank, their successors and assigns, at all times thereafter, the fee of the land, with the usual covenants for title and further assurance.

Now, the meaning and effect of that deed, when taken by itself, do not admit of doubt. The bank became the absolute owners of those three parcels of land, and the price which they undertook to pay for them was to be made good to the grantor of the deed by deducting £400 from the sum of £723 odd, which was then due by him. That converted the land of which the bank were in a position to demand a conveyance in security, by virtue of their equitable right, into their absolute property, and left Mr. Barton a personal debtor for the balance of the debt over and above £400.

The case which the appellant makes is that the parties, notwithstanding the plain terms of the indenture, intended to stand and did continue to stand toward each other in the relation of mortgagor and mortgagee, and that they remained in exactly the same position as they would respectively have occupied had an ordinary deed of mortgage been granted instead of the conveyance of the 20th July.

Now, undoubtedly, the terms of the conveyance may be qualified by collateral evidence; but in order to set aside the arrangement which the parties have assented to by executing and

receiving the deed, very cogent evidence is required in a case like the present. Where there is simply a conveyance and nothing more, the terms upon which the conveyance is made not being apparent from the deed itself, collateral evidence may easily be admitted to supply the considerations for which the parties interchanged such a deed; but where in the deed itself the reasons for making it, and the considerations for which it is granted, are fully and clearly expressed, the collateral evidence must be strong enough to overcome the presumption that the parties in making the deed had truly set forth the causes which led to its execution.

In the course of the argument some ingenious suggestions were made as to the reasons which might possibly induce the bank to take for their security an absolute conveyance instead of an ordinary mortgage; but it is difficult to conceive the reason why the parties, having the intention to stand in the same relation to each other as if the deed had been an ordinary mortgage, should take the trouble of inventing an arrangement in which there is not one particle of truth, according to the theory of the appellant, and inserting it in the deed for the simple purpose—their Lordships can conceive no other object—of hampering themselves in carrying it out. All that invention was quite unnecessary if the parties meant nothing more than the equivalent of an ordinary mortgage. The evidence which is relied upon for the purpose of cutting down the deed and reducing the bank's conveyance to the level of a redeemable right consists of some letters which passed between the bank and the late Mr. Barton, between the 30th of March, 1874, and the 27th of September, 1876. The first of these letters was from the bank to the deceased, and simply intimates to him that, as his indebtedness in the books was still continuing, it was time that he executed a proper mortgage in their favour, the alternative presented being that he should arrange to release his properties by payment of the debt. On the 9th of April that communication is answered by the deceased in terms which shew that he thoroughly understood and appreciated the difference between a mortgage of his land and conveyance of it in fee. He mentions both alternatives in the letter, and in the

J. C. 1890 — BARTON v. BANK OF NEW SOUTH WALES.

conclusion of it he indicates his preference for an arrangement under which the bank should take a conveyance of the land as in full payment of the debt. The next letter relied on was written by Mr. Barton, and was delivered to the bank on the same day as the conveyance was executed and delivered, and upon the terms of that letter there has naturally been a great deal of comment, because there are some expressions in it that might be characterised, if not as enigmatical, at all events as somewhat ambiguous. But the general purport and substance of the letter is beyond doubt. It sets forth that the bank are to take a conveyance in part payment of the debt, and it also states that, when they have taken a conveyance in part payment of the debt, the writer of the letter, Mr. Barton, will become personally liable, if his means improve and his estate is able to afford it, for the whole or part of the difference between his total debt and the value of the land in question.

It is sufficient to say that, in the opinion of their Lordships, those expressions, "in part payment of the debt," "whole or part of the difference," are altogether inconsistent with the idea that the writer of the letter supposed for a moment that he was executing a conveyance which was to be a security for the whole debt. The letters that follow do not appear to their Lordships to cast any further light on the matter. Two years afterwards, in September, 1876, the bank sent a note in general terms, which seems to have been a feeler thrown out for the purpose of ascertaining whether their debtor was in a position to pay the balance or not, in which they call his attention to the fact that he had paid nothing towards his indebtedness, which might very well mean his liability for the balance, and they ask for a remittance. But that Mr. Barton, when he received the letter, understood that he was not called upon to pay the whole debt and release the property is made perfectly clear by his answer of the 27th of September, 1876. He reminds the bank that his indebtedness was for the balance over and above what he terms the value of the property, and that his only undertaking was to pay that difference if he was in a position to do so, and then goes on to state that his means have not improved, and that therefore they must not expect a remittance; and the bank, being in-

formed that such was the state of their debtor's finances, seems to have taken no further steps in the matter before his death, which did not occur until about five years afterwards. There really is, from the beginning to the end of the correspondence which has been so much relied on, not a single expression which bears out the idea that the relation of the parties was to be that of mortgagor and mortgagee; whilst, on the contrary, it is in entire consistency, from the beginning to the end, with the fact of the arrangement narrated in the deed of the 20th of July, 1874, having been the very arrangement which the parties had made, upon which they understood that they were acting, and by which their rights were governed.

The appellant next relied upon the manner in which the bank dealt with this transaction in their books. Now the entries in the books do not appear to shew more than this—that from a period shortly after the date of that transaction in July, 1874, the account was headed as in liquidation. In point of fact, the account was in suspense, because if the arrangement be taken as really having been made, part of it had been completed, and upon that part no claim could lie; and as to the other part, the bank possibly treated it as irrecoverable, because it was to be irrecoverable if their debtor was not in a position to pay. Then interest was calculated. That circumstance does not appear to their Lordships to be of much consequence, because, although the interest was calculated in decimals by a clerk who had charge of the books, merely for the purpose of convenience if it required to be debited, in point of fact no interest was ever debited to Mr. Barton.

Then, lastly, the heaviest indictment brought against the bank upon the faith of these books was: Why was the payment to account not entered? Various reasons may be plausibly suggested why it was not credited to Mr. Barton. Their Lordships do not think it necessary to consider these. The absence of explanation upon the point is due to the party who complains of its absence, because had it not been for an objection taken by counsel for the appellant an explanation would have been given in some form or other. Their Lordships are not prepared to entertain an objection of that kind when it emanates from such

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a quarter, and in their opinion any inferences which may be derivable from the state of the defendants' books, and the terms in which this transaction is entered therein, are, taking them in the most favourable aspect for the appellant, quite insufficient to overcome the express and unequivocal terms of the indenture of the 20th of July, 1874.

Their Lordships will accordingly humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appellant must pay the costs of this appeal.

Solicitors for appellant: *Hill, Son, & Rickards.*
Solicitors for respondents: *Waltons, Johnson, & Bubb.*

[PRIVY COUNCIL.]

J. C.* 1890, *May* 15.

MAIN AND OTHERS . . . . . APPELLANTS;

AND

STARK . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Public Service Act, 1883, *s.* 49—*Powers of Classifiers—Construction—Junior Assistant.*

Where under Victorian Public Service Act, 1883, s. 49, every school-teacher employed in a State school at the date of the Act was directed to be classified as in the Act provided, and the classifiers thereunder assigned to the respondent the status of a junior assistant:—

Held, that, according to the true construction of the Act, the respondent not being in point of fact at the date of the Act a junior assistant, could not legally be classified as such; but that, having had at that time a definite status as assistant teacher, she was entitled to be classified accordingly.

The term "junior assistant" was not interpreted by the Act, and did not denote any denomination of teacher existing at its date, and there was no power under the Act to apply the term to the respondent so as to alter her position.

APPEAL from an order absolute (March 27, 1888) of the Supreme Court for the issue of a writ of mandamus calling upon the appellants, as the Committee of Classifiers under the Public

* *Present*:—THE EARL OF SELBORNE, LORD WATSON, LORD FIELD, and SIR BARNES PEACOCK.

Service Act, 1883, to classify the respondent in the third sub-class of the fifth-class teachers of the classified roll mentioned in the third schedule of the Act.

It was admitted that the respondent was entitled to be classified as in the Act provided. The question in the appeal was whether the entry of her name in the roll of junior assistants, in accordance with the form at the foot of third sub-class of the fifth class in part 2 of the third schedule to the Act was a proper classification under the Act.

Sir *H. Davey*, Q.C., *Finlay*, Q.C., and *Gurner*, for the appellants.

The Solicitor-General (Sir *E. Clarke*) and *Wace*, for the respondent.

The judgment of their Lordships was delivered by the

EARL OF SELBORNE:—

Under the 49th section of the Public Service Act, 1883, it is provided that "every school-teacher employed in a State school at the time of the passing of this Act shall be classified as in this Act provided;" that is, not according to any arbitrary discretion of the classifiers, but in the exercise of such discretion as within definite limits is given them by the Act. When a class has been assigned the teacher is entitled to have his name recorded. Every school-teacher therefore having a right to be classified and to have his name recorded, if the provisions of the Act have not been followed in those points as to which rules are laid down for the government of the classifiers, there must in some way or other be a remedy.

No question has been raised here as to the form of the remedy, and probably that was taken for granted as a point not to be raised when special leave was given for this appeal. Therefore their Lordships will assume that, at all events in this case, no question exists as to the procedure by mandamus if the provisions were not duly followed.

Taking that to be so, the point is a very short one. What the classifiers have done has been to put the lady who is the

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respondent here into the category of "junior assistants," which, if it be wrong, is a serious matter to her; because as to junior assistants—at all events, those who are so under the sixth schedule of the Act—it is expressly provided that they shall receive no increment to their stipends, which otherwise they would be entitled to receive. The Court below have thought that the classifiers have done wrong, and that she was not in point of fact a junior assistant; that they had no discretion to classify as a junior assistant anyone who was not so in point of fact, but that, having had a definite status in a State school to which she had been appointed as far back as the 30th of October, 1879, under a certificate of earlier date, which entitled her to fill the office of assistant teacher in any State school, and head or principal teacher where there was no assistant teacher, that was a status which gave her a right to be put into one of the three sub-classes of class 5. No question was raised as to the particular sub-class, because she was content to be placed in the lowest. The question for their Lordships is whether the Court was right in holding that she had not the status of a junior assistant within the meaning of the Act.

Their Lordships are of opinion that the Court below was right. A junior assistant, unless expressly interpreted by the Act, which it is not, might, in the natural use of language, mean a known denomination of teacher existing at the time when the Act was passed. If that was its meaning, it is not pretended that this lady ever held an office designated by that denomination. Therefore, if it were a known denomination at the time, there is an end of the case and the Court is right. But supposing it were not at that time a known denomination, as to which the fact is not clear one way or the other, what, according to the ordinary use of language, might that description mean? It could only mean one of two things—either an assistant not the first in rank and order in the school in which she was employed, or an assistant not possessing any fixed and definite status in the school, and therefore lower than those who were in a proper sense assistant teachers in the school. It cannot mean the first of those two things in this Act, for this reason, that the Act refers to the third schedule, and in the third schedule, which

gives the skeleton classification, their Lordships find that the first class includes only head teachers; the second class, the third and the fourth include only head teachers and first male or female assistant teachers; and, that being so, the fifth class is to include "all other assistantships than those specified above." Therefore the fifth class must include assistantships lower than the first assistantships in some schools, and it is impossible, consistently with that, that every one below the first can be held to be a junior assistant excluded from the increments which in the immediate context are mentioned; that sense is excluded. Well, then comes the other possible meaning, "a teacher without any fixed or definite status in the school." That may possibly be the meaning of it here; but if so, it clearly does not include the respondent, because she had been appointed to a fixed or definite status in the school, namely, as fourth assistant in the school at Hotham, in the colony of Victoria. Therefore that seems, if the natural interpretation of the words be looked to, enough to settle the case. She is not brought, according to any natural interpretation of the words "junior assistant," within that class.

But it was argued that, taking the 52nd section of the Act and the sixth schedule of the Act together, the means of interpreting the words "junior assistant" in the third schedule are found; and that the conclusion is, that every one ought to be regarded as a junior assistant who under the sixth schedule could not be employed in a school in any other capacity. Now the 52nd section certainly goes no way towards establishing that proposition, because it is in these words: "The classifiers in preparing the first classified roll shall place every teacher employed at the time of the passing of this Act in the class corresponding to the school in which he is employed and his position therein." That seems just. You are not to alter the position of the teacher. You are to classify him in the first roll as you find him. That does not go any way towards establishing the proposition, either that this lady was in any proper sense a junior assistant, or that she is to be deemed so, on account of something contained in the sixth schedule. The sixth schedule, when looked at, is on the face of it prospective. Their Lordships of course do not say that there might not be something in the

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context of an Act of Parliament, or to be collected from its language, which might give to words primâ facie prospective a larger operation; but they ought not to receive a larger operation unless you find some reason for giving it, and their Lordships are unable to find any such reason here. On the contrary, it seems to them that the reasons to be collected from the Act are quite the other way. The schedule begins thus: "Sixth schedule. Staff of schools. Assistant teachers in State schools shall be appointed as under." Then come clauses which regulate the number of assistant teachers to be employed in each school, and add that anything beyond those are to be junior assistant teachers. Those clauses are introduced by the words—"The assistant teachers appointed shall be of the following rank," which clearly have reference to the introductory words of the whole—"Assistant teachers in State schools shall be appointed as under." The schedule is referred to and introduced in the Act by the 61st clause: "Every school of each class shall, except as in this Act provided, be under the charge of a head teacher of the corresponding class;" and then follow the words: "Assistant teachers, pupil teachers, and sewing mistresses shall be allotted as provided in the sixth schedule hereto." That is prospective, as clearly—possibly even more clearly—than the schedule itself, and relates to the future organization and management of the schools. But it was not meant to take away vested rights and interests as they existed at the time of the Act. To give such a schedule, referred to in such a clause, that operation, would in the first place be contrary to general principles. Even if there were not on the face of the Act something affirming those principles, words not requiring a retrospective operation, so as to affect an existing status prejudicially, ought not to be so construed. But the present case does not depend upon general principles. The 68th section is express, that "All teachers shall retain the positions they hold on the passing of this Act, and shall be classified as in this Act provided;" and their Lordships find in the seventh schedule provisions for the gradual reduction of any excess in the existing staff, so as to meet the intended future arrangements. It is evident, therefore, that you cannot alter the position of this lady, or create for her a new position

which she did not fill before, by any retrospective application of the sixth schedule.

Then when we look at the third schedule, containing skeleton forms of classification, everything which appears there seems to be the reverse of favourable to the appellants' argument. Sir Horace Davey more than once laid stress upon the general heading of Part II. of the third schedule—"Classification and payment of head teachers and assistant teachers;" but that proves no more than that head teachers and assistant teachers were both to be classified; how they were to be classified depends in the first place upon their existing status, and secondly upon the manner in which that is recognised and provided for by the schedule in detail. The only part material for that purpose is in the heading to the fifth class—"Teachers who are licensed to teach, and also are in charge of fifth-class schools"—that would be head teachers—"or hold other assistantships than those specified above"—which would clearly include this lady in some way or other—"or act as relieving teachers"—which seems to distinguish relieving teachers from those other assistantships, properly so called. "Minimum fixed salary for males, £80 per annum, rising by three annual increments of £8 to a maximum of £104; but teachers employed as junior assistants under sixth schedule will receive no increment." Upon the last words, which are the most material ones, two observations arise. First of all, the word "employed" might leave one to find out, from the nature of the employment, whether they were junior assistants or not; but if there is something else lower down, as there is, which indicates that it should be defined by the terms of their engagement that they are to be junior assistants, the wording is perfectly consistent with that. But then it goes on, "under sixth schedule." Now this lady unquestionably when the Act passed had never been employed under the sixth schedule, for the sixth schedule was a prospective arrangement made by the Act. Therefore it would not appear that it could apply to her. And when their Lordships look at the structure of the skeleton classification, it is perfectly true, as Sir Horace Davey said, that it is divided under two heads, the first being thus described: "Head teachers and assistants other than junior assistants," who are subdivided

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in accordance with the 53rd clause of the Act, which provides for the subdivision of all classes except the first into three sub-classes, and the subdivision into three sub-classes applies only to that first head. So far there is a deviation in the form of this schedule from what seems to be contemplated on the face of the 53rd section of the Act; still it is in the Act, and it is not difficult to understand what is to be subdivided. The subdivisible class consists of head teachers and assistants other than junior assistants: but it was thought convenient to put in also, under a separate division, the excluded class of junior assistants. How is that done? It is done in a section, not subdivided at all, and headed by these words: "Names to be entered in order of seniority of appointment as junior assistants." According to the natural meaning of those words, it contemplates an appointment as junior assistant expressly, either by that denomination or in some way which, when you have ascertained it, naturally separates them from the others, and puts them into a junior class. That may or may not have been a thing known before the passing of the Act; but whatever other indications are found there, they are all against the notion that it could be meant to apply to such a teacher as the present respondent was. The last column, under the head of "Remarks," speaks of "Registered for position of relieving teacher," which plainly means a sort of supernumerary, as the Court below said. And in the column before that are the words: "Order of precedence for appointment to fifth-class schools, and for relieving teacher." What is there expressed indicates a class of lower grade certainly than that which this lady belonged to.

Their Lordships do not think it necessary to go further into the matter. It seems to them that the conclusion of the Court below was right, and ought to be affirmed, and they will so advise Her Majesty.

The question of the costs has been provided for expressly by Her Majesty's Order in Council granting leave to appeal.

Solicitors for appellants: *Freshfields & Williams.*
Solicitors for respondent: *E. F. & H. Landon.*

[PRIVY COUNCIL.]

LYONS . . . . . PLAINTIFF;

AND

HOFFNUNG AND OTHERS . . . . . DEFENDANTS.

J. C.*
1890
July 11, 15.

APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Stoppage in transitu—Right of Vendor—Duration of transitus.

Where goods are intended by the purchaser to pass direct from the possession of the vendors into the possession of a carrier, to be carried to a destination contemplated at the time of purchase by both parties:—

Held, that, whether or not delivery has been made to the carrier in such sense as to pass the property to the purchaser as owner, the goods, though held by the carrier as the purchaser's agent, are in transitu till the destination is reached; and that the vendors have the right to stop them.

Bethell v. *Clark* (20 Q. B. D. 615) approved.

APPEAL from an order of the Supreme Court (Windeyer and Foster, JJ., Innes, J., dissenting), made on the 14th of September, 1888, setting aside a verdict in favour of the appellant, and granting a new trial.

The action was brought by the appellant as official assignee of an insolvent named William Clare, carrying on business at Sydney, against the respondents, also carrying on business there, practically for the conversion of goods sold by them to the insolvent Clare upon credit, which goods they had stopped, as they contended, in transitu, between the port of Sydney and the port of Kimberley in Western Australia. The goods at the time of such stoppage were on board the S.S. *Gambier*, destined for Kimberley. Such stoppage was effected by the respondents because of Clare's insolvency coming to their knowledge after the goods left Sydney and before their arrival at Kimberley, and was obtained by their indemnifying Messrs. Wm. Howard Smith & Sons, Limited, the owners or charterers of the said steamer, the respondents being unpaid vendors of the goods. The

* *Present.*—LORD WATSON, LORD HERSCHELL, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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respondents upon such indemnity obtained delivery up to them of the said goods.

The facts are stated in the judgment of their Lordships. The judgments of the Supreme Court are reported in 9 L. R. N. S. W. p. 313. Those of the majority proceeded on the ground that the verdict was against evidence and against the weight of evidence, and that the learned Chief Justice had misdirected the jury in telling them that "if Clare handed up to Howard Smith & Co. the bills of lading or shipping receipts received by him (Clare) from the respondents, and received from Howard Smith & Co. another bill of lading, it was of no moment whether the latter bill of lading contained the names of the respondents as shippers, because if at that time Howard Smith & Co. entered into a contract with Clare to carry these goods and were paid freight, there would then be a fresh contract with Clare under which Howard Smith & Co. became Clare's agents, and it would be equivalent to a delivery to Clare."

Barnes, Q.C., and *P. Howard Smith*, for the appellant, contended that the verdict was not against evidence, and ought to have been upheld. As to misdirection, it was contended that the contract between Clare and the respondents was that the respondents should deliver the goods to Clare at the wharf of Howard Smith & Co. On such delivery having been made pursuant to contract, the transitus of the goods as between Clare and the respondents came to an end, and the seizure complained of took place after the transitus had ended. The purchaser had got possession, and the vendors' right to stop was determined. [Reference was made to *Dixon* v. *Baldwin* (1); *Kendal* v. *Marshall, Stevens & Co.* (2); *Bethell* v. *Clark* (3); *Valpy* v. *Gibson* (4); *Ex parte Miles* (5); *Ex parte Watson* (6); *Whitehead* v. *Anderson* (7).]

Finlay, Q.C., and *Pollard*, for the respondents, were not heard.

(1) 5 East, 175.
(2) 11 Q. B. D. 356.
(3) 19 Q. B. D. 553; S. C. 20; Q. B. D. 615.
(4) 4 C. B. 837.
(5) 15 Q. B. D. 45.
(6) 5 Ch. D. 35.
(7) 9 M. & W. 518.

1890. July 15. The judgment of their Lordships was delivered by

LORD HERSCHELL:—

The question raised in this action is whether the respondents, who are merchants carrying on business in Sydney, were entitled to stop in transitu certain goods which were purchased of them by William Clare, the trustee under whose insolvency is the appellant on the present appeal, and was the plaintiff in the action below.

At the trial evidence was given by William Clare that when he purchased the goods he gave instructions to Davis, who was acting on behalf of the vendors, to mark the packages $\frac{W}{K}C$, that is, William Clare, Kimberley, and that he told him to send the goods, when packed and marked, down to Howard Smith & Co.'s wharf in Sydney. He stated that he gave no other instructions; but on cross-examination he admitted that he had told Marks that the goods were going to Kimberley; that he was going to take the goods there; that they were going with him. The evidence given by Marks was, that a day or two before the purchase he saw Clare, who told him that he was going to Kimberley; that he wanted the goods he was purchasing to be shipped by the first boat, which was the *Gambier*; and evidence was also given by Davis that at the date of the purchase Clare had stated that he was undecided whether the goods were to go by the *Gambier* or some other vessel, but that he would let them know; and that he came two days later and told them the goods were to be shipped by the *Gambier* to Kimberley.

Messrs. Howard Smith & Co., to whose wharf the goods were to be sent, are shipowners, and were known to both parties to be then loading vessels for the port of Kimberley, the earliest of their vessels to sail being the *Gambier*. The goods were sent by the respondents to Howard Smith & Co.'s wharf, and a document was sent with them which was initialed on behalf of Howard Smith & Co. by one of their employés, which was in these terms:— "Wm. Howard Smith & Sons, Limited, Sydney, 20/5/86. Steamer *Gambier*. For King's Sound. Shipper, S. Hoffnung & Co. Consignee, W. Clare. Goods, Kimberley." It appears that in respect of some of the goods, those apparently that were in bond,

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a more elaborate form of receipt was given by the shipowners; but in those receipts also Hoffnung & Co. were described as the shippers of the goods, Clare as the consignee, and the place of destination as Kimberley.

At the trial before the chief justice several questions were put to the jury. The first three were in these terms: (1) "Did Clare instruct the defendants to deliver the goods to Clare at Howard Smith & Co.'s wharf, and did the defendants accept such instructions?—Yes. (2) If so, did the defendants in fact deliver the goods at Howard Smith & Co.'s wharf in accordance with such instructions?—Yes. (3) Did Clare instruct the defendants to ship the goods by the S.S. *Gambier*, and consign them to him at Kimberley?—No." The 4th is immaterial, and it was not answered by the jury. The 5th was in these terms: "After the goods were in fact delivered at Howard Smith & Co.'s wharf, was any contract entered into between Clare and Howard Smith & Co. to ship the goods to Kimberley on his account?—Yes."

Upon those findings the chief justice entered the verdict for the plaintiff. A rule was afterwards obtained to set aside that verdict and for a new trial, on the ground that the findings of the jury were against the weight of evidence, and also on the ground that the learned chief justice had misdirected the jury on a point to which their Lordships will call attention hereafter. That rule came on for argument before three learned judges in the Supreme Court and was made absolute for a new trial by a majority of those judges.

The first question their Lordships have to consider is whether the verdict can, as the appellant alleges, be supported as being right upon a true view of the facts proved at the trial, or at least as being one which might reasonably be found by the jury. The first two questions put to the jury appear to their Lordships to be possibly open to the charge of ambiguity. If the meaning of the language used, "Did Clare instruct the defendants to deliver the goods to Clare at Howard Smith & Co.'s wharf?" and "Did the defendants in fact deliver the goods at Howard Smith & Co.'s wharf in accordance with such instructions?" be,—Were the instructions to deliver them to Clare personally at Howard Smith & Co.'s wharf, and were those instructions obeyed?—it is

obviously impossible to support the finding. But even if the meaning be—Were the defendants to deliver the goods to Clare at Howard Smith & Co.'s wharf in this sense, that they were to be held by Howard Smith & Co. for Clare, not as carriers, but as his agent in some other capacity?—the verdict appears to their Lordships to be entirely against the weight of evidence, or indeed to have no evidence at all to support it. If all that was meant be—Were the goods to be delivered to Clare, at Howard Smith & Co.'s wharf, in this sense, that the transaction of sale and delivery was to be then completed, so that the property should pass to Clare, and he should become the owner of the goods?—the finding would be perfectly correct, but wholly immaterial upon the question whether the respondents had a right to stop the goods in transitu.

Reliance was placed by the appellant on the fact that the receipts which have been mentioned were handed over by the respondents to Clare, and that, being in possession of these receipts, he obtained from Howard Smith & Co. a bill of lading. He stated that in that bill of lading he was named as consignee, but that the name of Hoffnung & Co. did not appear as shippers. Their Lordships think that some doubt may well be entertained whether he is accurate in that statement, having regard to the evidence as to the course of business, and indeed applying common knowledge as to the course which such a transaction would ordinarily take. But, however that may be, and assuming it to be the fact that he did obtain such a bill of lading, in their Lordships' opinion the circumstance is wholly immaterial. The goods were undoubtedly carried by the vessel *Gambier* on a voyage to Kimberley, and were in transit upon that voyage at the time when, owing to the insolvency of Clare, the respondents stopped them. The arrangement for the freight at which the goods were carried appears to have been made in contemplation of this and other purchases by Clare before the date when those purchases were effected. The shipowners undertook, in consideration of the fact that he was about to have a considerable quantity of goods shipped, to carry them somewhat below the ordinary freight. As far as the evidence goes no transaction with regard to the carriage of these goods took place between Clare and the ship-

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owners after the date of the purchase, except the exchange of the receipts which have been mentioned for the bill of lading. Even assuming that the jury were entitled to disregard all the oral evidence in the case except that given by Clare, and to act upon that evidence alone, in the opinion of their Lordships the decision ought to have been in favour of the defendants in the action.

It appears to their Lordships that, upon the undisputed facts of the case, the right to stop in transitu under the circumstances proved at the trial was clear. The goods at the time of the purchase were undoubtedly intended by the purchaser to pass direct from the possession of the vendors into the possession of a carrier to be carried to a destination intimated by the purchaser to the vendors at the time of the sale; because, although the language used by Clare according to his evidence was that he was going to Kimberley, and going to take these goods with him, that language must be interpreted according to the ordinary course of business as it would be understood by business men; and it is obvious that Clare was not going to take these goods with him in any other sense than that he intended himself to be a passenger by the vessel on which they were to be shipped and by which they were to be carried, his intention being that the goods should be shipped on board that vessel as cargo in the ordinary way, carried by carriers to their destination, and there delivered to him.

These circumstances appear to their Lordships sufficient to indicate that the right to stop in transitu existed. The test laid down by Lord Ellenborough in the case of *Dixon and Others* v. *Baldwin and Another* (1) appears clearly to cover such a case as this. Alluding to the case of *Hunter* v. *Beal* (2), in which it was said that "the goods must come to the *corporal touch of the vendees*, in order to oust the right of stopping in transitu," Lord Ellenborough says that this was "a *figurative* expression, rarely, if ever, strictly true. If it be predicated of the vendee's own actual *touch*, or of the touch of any other person, it comes in each instance to a question whether the party to whose touch it actually comes be an agent so far representing the principal as to

(1) 5 East, 175. (2) Cited in *Ellis* v. *Hunt*, 3 T. R. 467.

make a delivery to him a full, effectual, and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier or means of conveyance to or on the account of the principal in a mere course of transit towards him." Their Lordships think it cannot be doubted that in the present case, putting the case most favourably for the appellant, the goods came into the hands of Howard Smith & Co. as carriers on Clare's account.

The law appears to their Lordships to be very clearly and accurately laid down by the Master of the Rolls in the case of *Bethell* v. *Clark* (1). He says: "When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are in transitu and may be stopped." The present case appears to fall distinctly within the terms there employed. The goods had not been delivered either to Clare or to any agent of his to hold for him otherwise than as a carrier, but were still in the hands of the carrier as such and for the purposes of the transit. There does not seem to be any pretence for the allegation that Howard Smith & Co. were ever intended to receive or hold, or ever did receive or hold these goods except as carriers, to convey them to their destination, Kimberley. No arrangement other than an arrangement with reference to the terms of freight had been made by Clare, before the goods were put into the possession of Howard Smith & Co. They were received by Howard Smith & Co. upon the terms—for they signed receipt notes to that effect—that they should be carried by them to Kimberley by means of a particular vessel. Those receipts, shewing the terms upon which the goods had been received, passed into the hands of Clare, and were acted upon by him without the slightest objection to their form. After he had obtained possession of the receipt notes all that he did was to exchange them for a bill of lading, in order that they might, under that bill of lading, be carried to Kimberley, their destination. There does not therefore seem to be throughout

(1) 20 Q. B. D. 615.

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the whole transaction the slightest evidence that Howard Smith & Co. ever held or were intended to hold these goods otherwise than as carriers, to be taken by them to their destination.

Under these circumstances it seems difficult to understand the contention that the right of stoppage in transitu did not exist. The learned chief justice, in summing up to the jury, appears to have told them that if Clare made a new contract with Howard Smith & Co. in respect of the carriage of these goods after they came into their possession, that would be sufficient to constitute a delivery to Clare, which would put an end to any right to stop in transitu. Their Lordships gather this from the particular direction complained of, and which formed one of the grounds on which the rule was granted. The ground was: "That his Honour, it is submitted, erroneously told the jury that if Clare handed up to Howard Smith & Sons, Limited, the bills of lading, or shipping receipts, received by him from the defendants, and received from Howard Smith & Sons, Limited, another bill of lading, it was of no moment whether the latter bill of lading contained the names of the defendants as shippers, because if at that time they entered into a contract with Clare to carry these goods, and were paid freight, then there would be a fresh contract with Clare, under which Howard Smith & Sons, Limited, became Clare's agents, and it would be equivalent to a delivery to Clare." No doubt it might be equivalent to a delivery to Clare for the purpose of passing the property to Clare; but if his Honour intended to instruct the jury that such a contract entered into between Clare and the shipowners would be equivalent to the shipowners holding the goods for Clare otherwise than as carriers, and becoming his agents so as to create a new transaction, having its initiation only at that time, their Lordships are unable to agree with the law which appears to have been laid down. If the goods were received by Howard Smith & Co. to be carried to Kimberley, and this was indicated as the destination of the goods at the time when the vendors were instructed to deliver the goods to the carriers, then, in the view which their Lordships take, it is immaterial whether a fresh bill of lading was obtained by Clare, or whether that bill of lading contained the name of Clare or of the defendants as shippers.

The appellant relied upon several cases which were pressed by the learned counsel on their Lordships, in which it had been held that although the vendor knew that some foreign destination was intended for the goods, yet if he delivered them to a shipping agent to be by him sent abroad, the transit, so far as the vendor was concerned, then came to an end, and that there was no right in the vendor to stop on the subsequent voyage. Their Lordships do not think that those cases are in any way applicable to the circumstances existing here. There the delivery was not a delivery by the vendor to the carrier to be carried to a destination indicated at the time of sale. A new transit commenced which had its origin in the action of the shipping or forwarding agent, as the case might be, which appears to be an altogether different case from that with which their Lordships have to deal, where the goods passed direct from the hands of the vendors into the hands of the carriers, to be carried to the destination then contemplated by both parties.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from be affirmed. The appellant must pay the costs of the appeal.

Solicitors for appellant: *Walker & Mewburn-Walker.*
Solicitors for respondents: *Helmsley & Helmsley.*

[PRIVY COUNCIL.]

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THE SANITARY COMMISSIONERS OF GIBRALTAR . . . . . } DEFENDANTS;

AND

ORFILA AND OTHERS . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF GIBRALTAR.

Liability of a Statutory Body—Construction of Statutes—Nonfeasance—Claim for Damages.

The liability of a body created by statute is governed by the statutes which create it. The powers conferred when exercised at all must be executed with due care. In the absence of a contrary intention, its duties and liabilities are the same as those imposed by the general law on a private person doing the same thing. But for mere nonfeasance no action lies except in regard to a duty towards the Plaintiff imposed by the statute, and negligently omitted.

Mersey Docks v. *Gibbs* (Law Rep. 1 H. L. 93) approved.

In an action to recover damages for injury to the respondents' property arising from the fall of an overhanging road, consequent upon the giving way of its retaining wall, which the appellant corporation was under a statutory duty to maintain for the purposes merely of road conservancy, it appeared that the result was due to original defects in the structure of the wall, and that the appellant was not negligently ignorant thereof, and not guilty of misfeasance:—

Held, that, according to the true construction of the Orders in Council constituting the appellant corporation, it was vested with administrative powers, subject to the control of the Government, and that there was no intention to render it responsible to the respondents in respect of such injury.

APPEAL from a decree of the Supreme Court (January 7, 1889), upholding a verdict of assessors in favour of the respondents for the sum of 55,000 pesetas, and also, by special and further leave, from an order of the same Court (January 11, 1889), refusing a rule to shew cause why such verdict should not be set aside and a new trial granted.

The facts are stated in the judgment of their Lordships.

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

Cohen, Q.C., and Sir *Horace Davey*, Q.C. (*Cowell*, with them), for the appellants, contended that their liability for the accident which had occurred was not made out. It must be decided by English law, whereby the liability of a body created by statute with statutory duties is governed by the statutes creating it. In this case the duties entrusted to the appellants were such as would otherwise have rested with the public or Government, and consequently unless the statutes imposed liability expressly or by necessary inference, it remained with the public or Government. The appellants did not build the walls, nor add to nor strengthen them. There is no finding as to misfeasance; the case is one simply of nonfeasance. If the walls were originally built insecurely, they had at least answered their purpose for a lengthened period. There was nothing to suggest insecurity; the appellants were not negligently ignorant of it; it could not have been discovered that the foundations were bad without taking down the wall for that purpose. Reference was made to the Sanitary Order in Council of 1865, sects. 27, 131, and 133; of 1883, sects. 34, 160, and 440, as to the meaning of "vest:" see *Coverdale* v. *Charlton* (1), and to the various clauses in those and the earlier orders which shewed the constitution of the corporation, the limitation of its powers, and its dependence on the Government for antecedent consent and approval in regard to many of its duties. The Commissioners were under the control of Government, and could be dismissed for certain causes. [Reference was made to the *Mersey Docks* v. *Gibbs* (2), and *Coe* v. *Wise* (3).] Neither at common law nor under the Orders of Council did the action lie against the appellants as surveyors of highways, nor was there any obligation to the respondents as owners of premises away from and below the road. Reference was made to *Parsons* v. *Vestry of St. Matthews* (4); *Gibson* v. *Mayor of Preston* (5); *Hammond* v. *Vestry of St. Pancras* (6); *Madras Railway Company* v. *Zemindar of Carvatenagaram* (7); *Withers* v. *North Kent Railway Company* (8); *Nichols* v. *Marsland* (9); *Fleming* v. *The Mayor*

(1) 4 Q. B. D. 104.
(2) Law Rep. 1 H. L. 93.
(3) Law Rep. 1 Q. B. 711.
(4) Law Rep. 3 C. P. 56.
(5) Law Rep. 5 Q. B. 218.
(6) Law Rep. 9 C. P. 316.
(7) Law Rep. 1 Ind. Ap. 364.
(8) 27 L. J. (Exch.) 417.
(9) 2 Ex. D. 1.

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and Corporation of Manchester (1); *Blyth* v. *Birmingham Waterworks Company* (2); *Tucker* v. *Axbridge Highway Board* (3); *Foreman* v. *Mayor of Canterbury* (4).

[LORD WATSON:—This was not an injury to a passenger, but to the owner of house property.]

That is a distinction relied on by the appellant: see *Gorris* v. *Scott* (5); *Ward* v. *Hobbs* (6). [Reference was also made to three cases relied on by the Chief Justice, viz., *Manley* v. *St. Helen's Canal and Railway Company* (7); *Hole* v. *Sittingbourne and Sheerness Railway Company* (8); and *Winch* v. *Conservators of the Thames* (9), and the distinction drawn that in those cases the liability was in respect of an implied term in the contract with the legislature.]

Finlay, Q.C., and *English Harrison*, for the respondents, contended that the evidence was sufficient to support the findings. The percolation of water, owing to the road being paved with cobbles and to there being no sufficient outlet, was the source of the mischief which ensued. If the appellants chose to abstain from paving the road with concrete, the duty was imposed upon them of carefully examining the road from time to time to see if saturation was producing mischief. They negligently omitted to provide for carrying off the surface waters and allowed them to percolate. It was impossible to say that there was no evidence to go to the jury as to negligence. As to the case of *Withers* v. *North Kent Railway Company* (10), it was fully discussed in *Great Western of Canada Railway Company* v. *Braid* (11). The appellants chanced the foundation being sufficient, while the evidence shewed that they negligently allowed the water to accumulate. It was not contended that there was any warranty by the appellant that the wall should stand, and the authority of *Hammond* v.

(1) 44 L. T. (N.S.) 517; overruled according to a report in the *Times*, June 27, 1882 (see Glen on the Law of Public Health, p. 573).
(2) 11 Ex. 781.
(3) 5 Times L. R. 26.
(4) Law Rep. 6 Q. B. 214.
(5) Law Rep. 9 Ex. 125.
(6) 4 App. Cas. 23.
(7) 2 H. & N. 840.
(8) 6 H. & N. 488.
(9) Law Rep. 7 C. P. 458; Law Rep. 9 C. P. 378.
(10) 27 L. J. (Exch.) 417.
(11) 1 Moo. P. C. (N.S.) 101, 118.

Vestry of St. Pancras (1) was not disputed. The wall and road were under the control of the appellants, and their negligence, which was an essential portion of the case, was proved and found.

With regard to *Gorris* v. *Scott* (2), and other cases of that class, the principle contended for was that the ordinance gave the control of the walls and road for a particular purpose, and that the appellants were bound ratione tenuræ to the owners of adjacent property (see Ordinance of 1865, sect. 27, and the other sections cited by the appellant).

It was further contended that *Gibson* v. *Mayor of Preston* (3), and the other cases of that class, had no application. They are an exception to the rule of law as laid down in *Mersey Docks* v. *Gibbs* (4). That exception rests on a peculiar principle, that no parish is liable to indictment for non-repair, which has no application to Gibraltar. *Blackmore* v. *Vestry of Mile End Old Town* (5) illustrates the very special character of the above exception. The verdict ought to be upheld on the ground that there was evidence to go to the jury that the fall of the wall was due to the appellants' negligence, and as one which reasonable men could find; and that there was a legal obligation to the respondents and other adjoining proprietors. Although a bare omission to perform a statutory duty could only give a right of action to persons within the purview of the statute, yet when a duty has been actually assumed and then neglected, an action lies in favour of any one injured thereby. Sect. 440 of the later order shews that a duty to the inhabitants as well as to passengers is recognized.

Cohen, Q.C., replied.

The judgment of their Lordships was delivered by

LORD WATSON:—

This is an appeal from a decree and order of the Supreme Court of Gibraltar, entering judgment against the appellants for 55,000 pesetas in respect of a verdict obtained by the respondents

(1) Law Rep. 9 C. P. 316.
(2) Law Rep. 9 Ex. 125.
(3) Law Rep. 5 Q. B. 218.
(4) Law Rep. 1 H. L. 93.
(5) 9 Q. B. D. 451.

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before the chief justice and assessors, and refusing a motion for a rule to shew cause why the verdict should not be set aside and a new trial granted. The points raised for decision in the course of the argument cannot be intelligibly stated without some detail of the circumstances of the case. The substantive facts proved at the trial were not made matter of dispute, although the parties seriously differed as to the inferences which ought to be derived from them.

The respondents have amongst them the full title to a parcel of ground in Gibraltar, with a dwelling-house and other premises erected thereon, situate at the base of a steep rocky cliff. At the height of 45 feet above the respondents' property, a highway 15 feet wide, and known as the Castle Ramp or Road, runs along the face of the cliff. The inner edge of the road is bounded by the wall of an old Moorish castle, and has apparently a secure foundation; but its outer edge, which was bounded by a parapet wall, rested upon soil kept in position by a retaining wall, which was carried down to the rock. The parapet wall had its foundation in the soil confined between the face of the rock and the retaining wall. In these circumstances it is obvious that the efficacy of the support given to the outer part of the road depended upon the stability of the retaining wall, and the pressure which the latter had to resist was increased by the weight of the parapet wall.

The appellants are the Sanitary Commissioners for Gibraltar appointed in terms of the Sanitary Order in Council, Gibraltar, 1883. It will be necessary hereafter to make particular reference to the terms of the ordinance; for the present it is sufficient to say that the appellants are thereby charged with the duty of maintaining and repairing public highways, including the road already described.

During the seven days commencing on the 26th of December, 1887, and ending on the 1st of January, 1888, there was continuous and heavy rain. From the 26th to the 29th of December the total rainfall was 5·92, and on the three following days 7·02 inches. On the 29th of December part of the retaining wall gave way at its base, and the débris fell upon the respondents' property, occasioning considerable damage. On the 2nd of

January a second slip occurred, when the remainder of the retaining wall came down, bringing with it the parapet wall and four feet of the outer margin of the road, to the further injury of the respondents' premises.

The action is directed against the appellants in their capacity of Sanitary Commissioners, and the only conclusion to which it is necessary to advert is that for recovery of damages for injury to the premises consequent upon the giving way of the retaining wall. Shortly stated, the allegations made by the respondents in support of their claim are to the effect that the appellants being, by the Sanitary Order of 1883, vested with the road, its culverts, water-channels, and retaining and other walls, for the purpose of "controlling, managing, and maintaining" the same, did discharge the duties thus imposed upon them so negligently and unskilfully that "the said highway and walls were in a dangerous state, whereof the defendants had or were bound to have notice," in consequence of which the "said wall or walls, or part thereof, slipped and fell" in and upon the premises of the respondents. The alleged grounds of liability may be resolved into these propositions,—(1) that the sanitary ordinance cast upon the appellants the duty of maintaining the road and retaining walls in a stable condition, with a view to the safety and protection of the respondents' property, and (2) that the appellants, or those for whose acts and omissions they are responsible, negligently failed to perform that duty.

At the trial of the cause, it was proved that neither the road, nor the retaining wall which was necessary for its support, had been constructed by the Sanitary Commissioners, and that both had existed from a period beyond human memory. After the fall occurred it was discovered that the original construction of the base of the retaining wall was defective. The foundation of the wall is said by the witnesses to have been wanting in thickness and solidity, and it was rested on the rough slope of the rock, instead of a transverse cutting being made into the face of the rock for its reception.

The surface of the road, which was paved with cobbles, and also its water-channels, were, in the end of December, 1888, in the same condition in which they had been kept for more than

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twenty years past. It does not admit of dispute that cobbles permit water to percolate through them more freely than a surface macadamized or flagged.

The evidence points to the conclusion that the original weakness of its foundation, and possibly the presence of water between it and the rock, were the proximate causes of the retaining wall bulging out or slipping on the 29th of December, and of its subsequent collapse. Captain Buckle, R.E., the Colonial Engineer, and leading witness for the respondents, after describing the defects of the foundation, goes on to say, "The saturation of the strip between walls would be another source of want of safety." But the same witness explains that "if outer wall had foundations, proper thickness and solidity, it would have retained the road, wet or dry, even if pavement permeable"; and in this he is corroborated by Colonel Stephens, R.E., the other witness of skill for the respondents, who says, "If foundations of wall had been in good rock the rain would not have affected them."

No attempt was made by the respondents to prove that the appellants or their officials actually knew or believed that the foundation of the retaining wall was insecure. And it has not been suggested that, assuming the appellants to have been justified in supposing the foundation to be sufficient, they were guilty of negligence, inasmuch as they did not make the surface of the road impervious to water. The only fault which the respondents, in their evidence, attribute to the appellants, consists in the latter having, before the disaster, negligently remained ignorant of the structural defects which it exposed. There being a controversy between the parties on this point, it is necessary to advert to the circumstances upon which the imputation of negligent ignorance rests.

Until December, 1888, the retaining wall had remained in situ, giving efficient support to the Castle Road, without exhibiting any symptoms of frailty or decay. So long as it stood, there were no external or visible signs to indicate that it was less stable, and therefore more liable to give way, than it had been ten or even sixty years ago. The disaster of 1888–89 revealed the fact that it was, and had all along been, attended with danger owing to structural defects in its foundation. That is admitted

on all hands; but the fact that latent danger did exist does not necessarily imply that there was negligence in not discovering its existence. There is no evidence tending to fix such negligence upon the appellants, except in the testimony of Captain Buckle; and all that he says on the subject is: "I was engineer of the Sanitary Commissioners nearly three years. Do not recollect visiting that road. The result proves that there must have been danger. I had a special assistant for roads, Mr. Tudury Jones' Battery is over road. *As an expert I say that if it had been specially inspected the danger would have been discovered. The whole should have been examined if you wish to discover danger.*" It may be observed that these statements were made on cross-examination, no allusion being made to the subject in his evidence-in-chief; but on re-examination he says, "*I think the locality called for special examination.*"

At the end of the trial the learned Chief Justice submitted eleven questions, to all of which his assessors gave unanimous replies; and judgment was then reserved, in order that parties might be heard upon the points of law arising upon the application of these special findings. Some of them, which relate to the title of the respondents, contributory negligence, and other issues which have not been referred to in the course of the argument, need not be noticed here. The questions and answers of material importance in this appeal are the following:—

Question 3. Whether the wall and portion of ground which fell 29th of December, 1887, formed part of road, or was necessary for support of road?—*Answer.* That the wall which fell on 29th of December, 1887, did not form part of road, but was necessary for its support.

And, if the reply to this question be in the affirmative, then,—

Question 4. Whether the defendants, by their servants, took reasonable care, considering the situation of the road and retaining wall, to ascertain that they, as well as the surface and other drains, culverts, &c., were in a proper state of repair?—*Answer.* No.

Question 5. And whether the defendants, through their servants, had the means of knowing that the road and retaining wall, as also the above drains, &c., were not in a proper state of repair?—*Answer.* Yes.

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Question 6. And whether the damages would equally have happened if the road and retaining wall, drains, &c., had been in a proper state of repair?—*Answer*. No.

On the further hearing of the cause the present appellants argued that judgment ought to be entered in their favour, in respect that—(1) the retaining wall was found not to be part of the road; (2) no duty was cast upon them to repair the wall; (3) that they are a public body executing statutory duties without reward; and (4) that they are not liable for acts of nonfeasance, but only of misfeasance. In his judgment, which was delivered on the 7th of January, 1889, the learned Chief Justice dealt with all these reasons. He held that the retaining wall was vested in the appellants for all the purposes of the sanitary order; and, although he does not expressly say so, he evidently assumes that the protection of the respondents' premises against risks arising from original defects in the structure of the retaining wall constituted one of these purposes; or, at all events, that the duty was cast upon the appellants of maintaining the wall in such a condition as to prevent injury to these premises. The learned Judge rejected the third reason (which, as an independent proposition, is hardly maintainable) upon the authority of the *Mersey Docks Case* (1) and *Coe* v. *Wise* (2); and also the fourth, on the ground that *Gibson* v. *Mayor of Preston* (3), and similar decisions which were cited in support of it, have no application to the facts of this case. With a view to the present appeal, the appellants then made an application for a rule to shew cause why a new trial should not be granted, upon the ground, inter alia, that the verdict was contrary to evidence. The learned Judge having already expressed his views with respect to the merits of the case, the motion for a rule nisi was refused, without discussion, on the 11th of January, 1889.

In considering the responsibilities which attach to the present appellants, in the execution of their statutory duties, their Lordships desire to keep in view the rule expressed by Lord Blackburn, and approved by the House of Lords, in the *Mersey Docks Case* (4), to the effect "that in every case the liability of a body created

(1) Law Rep. 1 H. L. 93.
(2) Law Rep. 1 Q. B. 711.
(3) Law Rep. 5 Q. B. 218.
(4) Law Rep. 1 H. L. 104.

by statute must be determined upon a true interpretation of the statutes under which it is created." It is therefore necessary to examine the Ordinance of 1883, in order to ascertain the position occupied by the Sanitary Commissioners, and the powers and duties which are entrusted to them.

The Order in Council of 1883 is the last of a series of four ordinances relating to highways in Gibraltar, the first of them having been enacted on the 30th of December, 1815. At that date all public streets and highways were under the charge of Government, as appears to have been the case from the time when Gibraltar was annexed to the British Crown. The Ordinance of 1815 imposed a rate upon all occupiers of lands and premises within the limits of the garrison and town, to be applied in paving, repairing, and cleansing the streets, lanes, alleys, passages, and other places within the same. The rate was assessed by Commissioners appointed for that purpose by the Government, and was payable to and recoverable by the Governor, Lieutenant Governor, or Commander-in-Chief for the time being. A second Order was passed on the 1st of February, 1819, imposing a rate, to be assessed and levied in the same manner, for the purpose of defraying one half of the expense of lighting the streets and other places to which the previous rate was applicable, the other half being borne by the Government.

These streets and highways remained under the direct charge and control of Government until 1865, when an Order in Council, dated the 20th of December, repealed the Ordinances of 1815 and 1819, and transferred the management of highways and a variety of other sanitary duties to a body of Commissioners. That Ordinance was followed by the Order in Council of the 19th of July, 1883, which does not expressly repeal, but to a large extent supersedes its provisions. So far as not superseded, the enactments of the Order of 1865 are still subsisting, but the enactments upon which the liability or non-liability of the appellants depends are to be found in the later ordinance.

Under the Order of 1883 a certain number of Commissioners were selected by the Governor from a panel presented by the grand jury. One half of these Commissioners retire from office annually, when their places are supplied by the same method of

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selection. Besides the Commissioners thus chosen, the Governor appoints four by warrant under his hand—two to represent the Secretary of State for War, one to represent the Government of Gibraltar, and the other the Lords of the Admiralty. The Governor has also the power to dismiss by warrant any Commissioner who shall be guilty of misbehaviour.

The ordinary expenses of the Commissioners' administration are provided for by a general sanitary purposes rate, leviable in respect of real property within the garrison and town, the property of the Crown being expressly included. The duty of fixing and assessing the rate rests in the first instance with the Commissioners; but the rate is subject to the revisal of the Colonial Secretary, who must be satisfied that it has been duly made, and has power to disallow it if he shall consider it either unreasonable and excessive, or unreasonable and insufficient, there being an appeal from his decision to the Supreme Court who may confirm the rate. Sect. 240 enacts that "no public work or purpose of any kind, the cost of which is not intended to be defrayed out of the general sanitary purposes rate provided in the estimates for the current year, or for which it may be necessary to raise capital, shall be undertaken or executed by the Commissioners without the previous consent of the Governor by warrant." Capital, as distinguished from ordinary expenditure, may, when the estimate is less than 25,000 pesetas, with consent of the Governor, be raised on mortgage of the sanitary rate, and if it exceeds that sum may, with the approval of Her Majesty, signified by one of the principal Secretaries of State, be defrayed out of the Imperial Exchequer. All moneys received by the Commission are (sect. 46) directed to be paid into an account kept at the public Treasury, and it is enacted that these moneys "shall be kept separate and distinct from *other public moneys in the Treasury*."

Sect. 160 of the Ordinance of 1883 enacts that, "*Subject to such rules and regulations as may be made by the Governor under this Order*, the Commissioners shall be the surveyors of all the public highways in Gibraltar, and shall, for the purposes of this Order, *control, manage, and maintain* the public highways, and also all such culverts and water-channels as may be necessary to carry

off the surface water therefrom, and also all walls, *retaining walls and parapet walls situate thereon or pertaining thereto, and which are necessary for their support, or for the safety of passengers or ordinary traffic.*" The 27th section of the Sanitary Order of 1865 vests "all the public highways" in the Commissioners; but it is doubtful whether the clause extends to retaining walls in the position of that which gave way to the injury of the respondents' premises. The point does not appear to their Lordships to be of any consequence, because the vesting is only "so far as may be necessary for the purpose of carrying this Order into execution, but not further," which would not imply a larger interest or measure of control than is expressly conferred upon the Commissioners by sect. 160 of the Ordinance of 1883. Their interest and powers are, in either case, limited to purposes of road conservancy; for all other purposes, the property of the retaining wall in question remains with the Government, which has merely given the Commissioners such right of administration and control as may be necessary for the fulfilment of their statutory duties.

In these circumstances, the question arises whether it be according to the intention of these two Orders in Council that the Commissioners shall be responsible to the proprietors of premises adjoining the retaining walls of a roadway in respect of such injuries to their property as occurred in this case. In dealing with that question, it is a material consideration that the injury complained of arose, not from any act of the Commissioners or their servants, but from their nonfeasance. Their Lordships do not wish to suggest that Commissioners or other public trustees who have no pecuniary interest in the trust which they administer can escape liability when they are negligent in the active execution of the trust. It is an implied condition of statutory powers that, when exercised at all, they shall be executed with due care. But in the case of mere nonfeasance no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the Commissioners a duty toward himself which they negligently failed to perform. In the *Mersey Docks Case* (1) it was held that the trustees owed to all shippers and

(1) Law Rep. 1 H. L. 93.

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shipowners using the docks, and paying tolls for the accommodation, the statutory duty of keeping the docks and their entrances in a safe condition; and further, that the fact that the trustees held the tolls which they collected, not for their own profit but for the public interest, did not exempt these funds from liability for damage arising from their neglect of that duty. Lord Blackburn, in delivering the opinion of the consulted judges (1), stated the proper canon of construction to be that, "in the absence of something to shew a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing."

The rule thus enunciated, which met with the approval of the House of Lords, admitted of easy application to the Mersey Docks Trust, which was a corporate body, entirely independent of Government and of Government control, and differing in no material respect from a private enterprise authorized by statute, save in the fact that its undertaking and profits were held by trustees in the public interest, and not for the benefit of private corporators. But, under these Orders of 1865 and 1883, the Sanitary Commissioners of Gibraltar stand in a very different position from that occupied by the Mersey Docks Trustees and similar bodies in this country. They are appointed by the Governor, and may be dismissed by him for misconduct. Their powers of levying rates are controlled by the Colonial Secretary, subject to an appeal to the Supreme Court. They cannot raise money on the security of the rate, except with leave of the Governor, and then only to the extent of 25,000 pesetas—a sum less than half the amount for which the Court below has given a decree against them; and in cases when it is necessary to raise more than that amount it must come from Government moneys, if approved by one of Her Majesty's principal Secretaries of State. The only duty expressly laid upon them with respect to retaining walls is to maintain and repair them for the safety of passengers and ordinary traffic. And, lastly, it is expressly provided that, in executing the order, they must conform to any

(1) Law Rep. 1 H. L. 110.

rules and regulations which the Governor may think fit to make.

Their Lordships are, in that state of the facts, unable to resist the conclusion that the Government, in so far as regards the maintenance of retaining walls belonging to it, remains in reality the principal, the Commissioners being merely a body through whom its administration may be conveniently carried on. They do not think that it was the intention of the Crown, in giving the sanitary body administrative powers subject to the control of the Governor, to impose upon it any liability, which did not exist before, in respect of original defects in the structure of the retaining wall which supported the Castle Road.

Their Lordships desire to add that, assuming the Commissioners would have been liable, in respect of their failure to strengthen the foundations of the wall, on its being proved that they were negligently ignorant of its defects, there was, in their opinion, no evidence of such negligence to go to the jury. No doubt the result shewed that its foundations were or had become insecure, but until the result occurred no one suspected it. Captain Buckle says that a special inspection would have disclosed the danger; but the witness was himself the engineer of the Sanitary Commissioners for a period of three years, and at that time the propriety of making an inspection never occurred to him. It is obvious that no examination, short of taking down the foundations of the wall, would have led to the discovery of its defects; and although Captain Buckle, in his re-examination, does say that, in his estimation, "the locality called for special examination," he is evidently speaking in the light of actual experience; and not a single circumstance is suggested, either by him or any other witness, which could indicate to a person of ordinary prudence the necessity or propriety of making an examination of that kind.

Their Lordships are accordingly of opinion that the decree and order of the Court below must be reversed, and judgment entered for the appellants without costs; and they will humbly advise Her Majesty to that effect. There will be no costs of this appeal.

Solicitors for the appellants: *Parker, Garrett, & Parker.*
Solicitors for the respondents: *Clarkson, Greenwells & Co.*

[PRIVY COUNCIL.]

J. C.* 1889 Dec. 10, 12. 1890 March 25; April 23; June 25.

LA BANQUE D'HOCHELAGA AND ANOTHER APPELLANTS;

AND

MURRAY AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Law of Lower Canada—C. C. P. 1034 *and* 1035—31 *Vict. c.* 25—*Letters Patent of Incorporation—Fraud—Annulment of Letters Patent—Writ of Scire Facias.*

Where it appeared that the defendants and others had been incorporated by letters patent issued under the Great Seal of the province, which letters had been obtained by a fraudulent representation that the defendants and others had petitioned for the same, and a writ of scire facias was issued on an information by the Attorney-General against the company, its liquidator, and its judgment creditor, to shew cause why the letters patent should not be declared fraudulent, null, and void, "at least in so far as the said defendants were concerned":—

Held, under C. C. P. 1034 and 1035, that the Code does not authorize a partial annulment of letters patent as had been directed by the Court of Queen's Bench, that they ought to be entirely annulled, and that the terms of the prayer were wide enough to authorize an order to that effect.

APPEAL from a decree of the Court of Queen's Bench (May 19, 1888).

In May, 1883, the appellants, La Banque d'Hochelaga recovered judgment against a company carrying on business as "The Pioneer Beet-root Sugar Company, Limited," for the sum of $40,800. 80, together with interest as in the judgment specified, for which sum they issued execution against the company, when a return was made that there were no effects. The appellant bank thereupon brought separate actions against each of the respondents: William G. Murray, Henry E. Murray, Damase Masson, Alfred Masson, James P. Dawes, Andrew J. Dawes, Jean Leclaire, and John L. Lewis respectively, and also against one Charles Garth. The actions were consolidated, and the action

* *Present*:—LORD CHANCELLOR, LORD BRAMWELL, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

against William G. Murray was in effect treated as a test case, and was brought to a hearing together with the information hereinafter mentioned. By a consent subsequently entered into between the parties for the purpose of the appeal to the Privy Council, it was admitted that the declarations, pleadings, evidence, and judgments in the other actions were the same as those in the action against William G. Murray, mutatis mutandis.

Concurrently with the above actions, the then Attorney-General of the Province of Quebec, at the relation of the respective defendants thereto, filed an information by way of scire facias against the company, the appellant Darling as liquidator thereof, and the appellant bank alleging that the letters patent incorporating the company were obtained by fraud, and that the names of the several defendants were used as corporators without their knowledge or authority, and calling on the defendants to the information to shew cause why the letters patent should not be declared null and void, at least in so far as the defendants to the said actions were concerned.

By consent of the parties, the information was consolidated with the above-mentioned action against William G. Murray.

The question raised in these actions depended in great measure on the effect of the Quebec Act (31 Vict. c. 25). The appellants alleged that the respondents became holders of unpaid shares in the said company under the following circumstances:—

On various dates in the months of October and December, 1879, the respondents and certain other persons signed the following agreement or memorandum of association:—

"We the several persons whose names and addresses are subscribed are desirous of being formed into a limited company to be named the 'Pioneer Beet-root Sugar Company, Limited,' with a capital of one hundred and fifty thousand dollars, in pursuance of the Joint Stock General Clauses Act (31 Vict. c. 25 and 38 Vict. c. 39), subject to be amended by supplementary letters patent, and we respectively agree to take the number of shares of one hundred dollars each in the capital of the company, as set opposite our respective names."

This agreement or memorandum was subscribed by the respondents, Henry E. Murray, Alfred Masson, and John L. Lewis

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respectively for fifty shares of $100 each, and by the respondents William G. Murray, Damase Masson, James P. Dawes, Andrew J. Dawes, and Jean Leclaire respectively for twenty-five shares of $100 each.

Notice of the intention of the respondents and other persons who had signed the memorandum to apply for letters patent was given in the numbers of the *Quebec Official Gazette* published on the 27th of December, 1879, and on the 3rd, 10th, 17th, and 24th of January, 1880, in accordance with the provisions of the statute 31 Vict. c. 25, s. 3.

On the 23rd of February, 1880, a petition to the Lieutenant Governor of the Province of Quebec was presented in the names of the respondents and the said other persons in accordance with the provisions of sect. 4 of the said statute, praying for the grant of a charter of incorporation to them by letters patent, and naming amongst others the respondents, James P. Dawes and Alfred Masson, as two of the proposed directors of the company. The petition also contained a list of the persons who had subscribed for shares in the company, including the names of the respondents.

On the 15th of July, 1880, letters patent were issued in accordance with Act 31 Vict. c. 25, whereby, after reciting the said petition and that the facts therein set forth had been established to Her Majesty's satisfaction, the respondents and other persons specially named therein were constituted a body corporate by the name of the Pioneer Beet-root Sugar Company, with a capital stock of $150,000, divided into 1500 shares of $100 each.

Notice of the incorporation of the said company was duly given in the *Quebec Official Gazette*, in accordance with sect. 7 of the statute.

On the 27th of July, 1883, the company was ordered to be wound up, and John Fair was appointed liquidator.

Several actions having been brought against the respondents and other subscribers to the memorandum of association to enforce payment of the amount unpaid upon their respective shares in order to satisfy in whole or in part the judgment obtained by the appellant bank against the company, the respon-

dents in effect pleaded a general denial of the allegations of the several declarations, and denied that they had ever become shareholders in the company. They denied that they had ever promoted or been party to the incorporation of the company, and alleged that if their names had been used they had been used without the authority of the respondents and by fraud. They denied that they had ever been treated as shareholders or members of the company, or had ever been entered as shareholders in the books of the company. They alleged that the signatures of the said memorandum of association were conditional upon a bonus or subsidy being obtained from the Provincial Government, and that no such bonus or subsidy had been obtained. They further alleged that they gave notice to remove their names from the list of shareholders, and that they gave no authority for the use of their names as subscribers to the company.

The appellant bank joined issue upon the pleas of the respondents.

Evidence was given that parties signed the memorandum conditionally upon the Provincial Government undertaking to grant the company when formed a subsidy of $10,000 for seven years, and that this was a sine quâ non of applying for letters patent; that the promoters failed to obtain such undertaking; that thereupon the respondents withdrew and intimated that the scheme was at an end as far as they were concerned; that notwithstanding their withdrawal the letters patent were applied for in their names and without their knowledge; that on the 19th of August, 1880, the shareholders resolved that the respondents be released from their stock subscriptions.

On the 26th June, 1886, the Superior Court (Loranger, J.) gave judgment in the action against Murray as consolidated with the information. It dismissed the information with costs, and as regards the action, held, that Murray was a shareholder in the company, and that the company being in liquidation, the appellant Darling as liquidator, and not the appellant bank, was entitled to recover the sum of $2,800, being the amount which he found to be due upon such shares, and ordered that amount to be paid to the appellant Darling accordingly. As regards both the action and the information, the learned judge founded

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his judgment mainly on the ground that the subscription list signed by the respondent Murray was conclusive evidence that he agreed to become a shareholder in the company, and that parol evidence was not receivable, and that the respondent by his silence had ratified the application made in his name for the issue of the letters patent, which were conclusive evidence of the fact that he was a shareholder.

The Court of Queen's Bench, consisting of Dorion, C.J., and Cross, and Church, JJ. (Tessier, J., dissenting), upon appeal reversed the above decision upon both points. The majority of the Court held (and their decision was applicable to the cases against the other defendants), that the respondent Murray and the other defendants in the action had, before the presentation of the petition for letters patent, wholly withdrawn from the scheme, and had given notice of their withdrawal to the parties concerned; that they had never been notified of the application for or the grant of letters patent; that no stock was ever allotted to them, nor did they ever become shareholders in the company; and that the letters patent were obtained fraudulently and irregularly. They accordingly ordered the name of the respondent Murray to be struck out of the letters patent, and dismissed the action against him with costs.

Sir *Horace Davey*, Q.C., and *Kenelm Digby*, for the appellants, contended that the respondents, by signing the memorandum of association, entered into a binding agreement to take the number of shares in the company set against their respective names. Such agreement was never rescinded or cancelled either before or after the incorporation of the company. No formal allotment of such shares was required for the purpose of rendering the respondents liable, either under the statute or otherwise. The respondents amongst others were named in the letters patent as the persons who had applied for incorporation. They were duly incorporated. Under sect. 51 of 31 Vict. c. 25, the letters patent were conclusive proof of the matters and things stated therein. Evidence to the contrary was not admissible. The respondents, moreover, took no effectual steps to get the memorandum withdrawn or cancelled. They were estopped by their conduct from

alleging that the letters patent were obtained by fraud or without their authority. They were accordingly liable as shareholders, and have never been released from their liability. They were subscribers to stock within the meaning of 31 Vict. c. 25, s. 1, sub-s. 6. Reference was made to *Kidwelly Canal Company* v. *Raby* (1); *Burke* v. *Lechmere* (2); *Jones* v. *Montreal Cotton Company* (3); *Midland Great Western Railway Company (Ireland)* v. *Gordon* (4).

Next, the information by way of scire facias did not pray for a total repeal of the letters patent, but only so far as the respondents and others were concerned. Such remedy is not available by law on the proceeding by scire facias. The old practice was to order on scire facias that the letters patent should be brought in to be cancelled, and then followed the ceremonial of cutting off the seal. Reference was made to *Portal* v. *Emmens* (5). [*Bompas*, Q.C.: There is authority that letters patent can be repealed in part: *In re Sackville College* (6).] 4th Inst. p. 88, is an authority the other way: "It is said that the Chancellor by his ordinary power may hold plea of scire facias to repeal the King's letters patent." Three cases are stated in which he can do so, and in all the total and not the partial repeal is contemplated. Reference was made to *Scott* v. *Berkeley* (7); *Kipling* v. *Todd* (8); C. C. P. 1034 and 1035. [Their Lordships said that if they desired to hear counsel for the respondents notice would be given.]

Mar. 25. *Bompas*, Q.C., and *Gore*, were heard for the respondents, after an unsuccessful application to intervene had been made by *Finlay*, Q.C., and *Atkinson*, for Hope, a shareholder. They contended that the letters patent had been obtained by means of fraudulent suggestion or the concealment of material facts; that they had been granted by mistake, or in ignorance of material facts, or contrary to the provision of 31 Vict. c. 25, s. 7. Neither by the letters patent (if valid) nor otherwise were the respondents or any of them constituted holders of the number

(1) 2 Price's Rep. 93.
(2) Law Rep. 6 Q. B. 297.
(3) 24 L. C. J. 108.
(4) 16 M. & W. 804.
(5) 1 C. P. D. 201–664.
(6) Sir T. Raymond's Rep. 177.
(7) 3 C. B. 925.
(8) 3 C. P. D. 350.

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of shares specified in the provisional list signed by them or of any shares. Even if they had been so constituted, they had been released from liability by the resolution of the 19th of August, 1880, and by the subsequent acts of the company. Even where a person becomes a shareholder by signing a valid memorandum of association, if all the shares are subsequently allotted and none are left for him he is not to be treated as a shareholder. Reference was made to *Tothill's Case* (1); *Evans' Case* (2); *Hartley's Case* (3); *Snell's Case* (4); *Hall's Case* (5); *Baroness Wenlock* v. *River Dee Company* (6); *Kincaid's Case* (7); *Kipling* v. *Todd* (8); *Scott* v. *Berkeley* (9); Lindley on Companies (10), as to disputed liability to take shares.

Further, the remedy of liquidators against contributories is not by action at law, and the claim of the bank is limited to the amount of its unsatisfied judgment. As to proceedings by way of scire facias there is authority for partial annulment of letters patent in Raymond's Reports—the case of *Sackville College* (11), and authorities there cited.

Sir *Horace Davey*, replied.

1890 June 25

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from judgments of the Court of Queen's Bench for Lower Canada, in the Province of Quebec (Appeal Side), reversing judgments of the Superior Court for Lower Canada, Province of Quebec, District Montreal.

In May, 1883, the appellants, La Banque d'Hochelaga, obtained in the Superior Court a judgment against the Pioneer Beet-root Sugar Company, Limited, for $40,800. 80, with interest and costs, and on or about the 30th of May, 1883, the said appellants, under the provisions of the Quebec statute, 31 Vict. c. 25,

(1) Law Rep. 1 Ch. Ap. 85.
(2) Law Rep. 2 Ch. Ap. 427.
(3) Law Rep. 10 Ch. Ap. 157.
(4) Law Rep. 5 Ch. Ap. 22.
(5) Law Rep. 5 Ch. Ap. 707.
(6) 38 Ch. D. 532.
(7) Law Rep. 11 Eq. 192.
(8) 3 C. P. D. 350.
(9) 3 C. B. 925.
(10) Pages 817, 842.
(11) Sir T. Raymond's Rep. 177.

issued a writ of execution upon the said judgment, to which, on the 25th of June, 1883, the sheriff made a return of nulla bona.

In the month of June in the same year several actions were commenced by the appellant bank, as creditors of the said company in respect of the said unsatisfied judgment against the defendants respectively as shareholders of the said company, to recover from them respectively the amounts remaining unpaid upon the shares alleged to be held by them respectively in the above-mentioned company; and the question in each of the said actions was, whether or not the said defendants were liable as shareholders in the said company.

In the case of the defendant William G. Murray, he denied that he had ever promoted or been party to the incorporation of the said company, or connected therewith in any way, and alleged that if his name had been used it had been used without his authority and by fraud. He denied that he had ever been treated as a shareholder or member of the company, or had ever been entered as a shareholder in the books of the company.

On the 27th of July, 1883, the said company was ordered to be wound up, and John Fair was duly appointed liquidator. He afterwards obtained leave to intervene, in order that any amount recovered in the said action might be paid into the hands of the said liquidator, to be distributed, according to law, amongst the creditors of the company; and in September 1884, the appellant Thomas Darling was substituted for the said John Fair as intervener in the said cause.

It was enacted by the above-mentioned statute, 31 Vict. c. 25, s. 1, c. 6, that the expression "shareholder" or "stockholder" means every subscriber to or holder of stock in the company, and extends to and includes the personal representatives of the shareholder.

By sect. 2 it was enacted that the Lieutenant Governor in Council may by letters patent under the Great Seal grant a charter to any number of persons, not less than five, who shall petition therefor, constituting such persons and others who may become shareholders in the company thereby created a body corporate and politic for certain purposes therein mentioned, of which the purpose of the said Beet-root Sugar Company was one.

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The company was incorporated by letters patent, issued under the Great Seal of the Province of Quebec, in pursuance of the provisions of the said Act. The letters patent were issued upon a petition presented to his honour the Lieutenant Governor of Quebec in the names of Gerhard Lomer, the defendant William G. Murray, the other defendants, and other persons, stating that they had associated themselves together for the purpose of establishing a joint stock company for the manufacture of sugar from beet-root in the said province, and that they were desirous of obtaining a charter by letters patent under the Great Seal of the province, to constitute themselves and their successors and such other persons as had or might become shareholders a body corporate and politic, that each of them had taken and subscribed the amount of stock set forth therein, and praying that his honour would be pleased to grant a charter of incorporation to them by letters patent, to be issued under the Great Seal of the province, constituting them and their successors, and such other persons as had or might become shareholders, a body politic and corporate by the name of the "Pioneer Beet-root Sugar Company, Limited," for the purpose and with the capital stock therein mentioned.

The petition was verified by the solemn affirmation of the said Gerhard Lomer, in which he declared that to his knowledge the allegations and averments of the said petition were true, and it was accordingly recited in the letters patent that the said Gerhard Lomer, the defendants, and the said other persons had by petition represented that they were desirous to be incorporated by the name of the "Pioneer Beet-root Sugar Company," and that the truth and sufficiency of the facts stated in the said petition had been established to the satisfaction of Her Majesty.

It was enacted by sect. 51 of the said Act that, save only in any proceeding by scire facias or otherwise for direct impeachment thereof, the letters patent or supplementary letters patent themselves or any exemplification or copy thereof under the Great Seal should be conclusive proof of every matter and thing therein set forth.

Parol evidence was given in the actions on the part of the defendants; but the whole of that evidence was objected to, and

a motion was made by the bank that all parol evidence adduced by the defendants to contradict their subscription in writing to the capital stock of the said company, or to contradict the said letters patent or anything mentioned therein, should be declared illegal and be rejected.

In December, 1884, the defendants instituted proceedings for improbation of the said letters patent under Article 154 and following Articles of the Code of Civil Procedure for Lower Canada, with the object of having their names struck out of the said letters patent. That application was dismissed by the Superior Court, and the judgment having been in this respect affirmed by the Court of Queen's Bench, from which there has been no appeal, it is not necessary to consider it further.

In December, 1884, the Honourable L. O. Taillon, as Attorney General of the Province of Quebec, filed an information against the said company and the appellant Thomas Darling as liquidator thereof and the bank as mise en cause, whereby, after alleging, amongst other things, that the above-mentioned letters patent had been obtained by fraudulently suggesting that the defendants and others had petitioned for the grant of the same, and were desirous that the same should be granted, and alleging that the defendants had represented that they could not adequately defend themselves without the benefit of a scire facias, he prayed that a writ of scire facias should issue and be made known to the said company, and to the said Thomas Darling in his quality of liquidator of the said company, and to the said La Banque d'Hochelaga, ordering them and each of them to appear and shew anything which they or either or any of them might have or know why the said letters patent should not be declared fraudulent, null, and void, at least in so far as the said defendants were concerned; and further, that the Court being more surely informed of all the premises should then declare by the judgment to be rendered on the said information that the said letters patent were fraudulent, null, and void, at least in so far as the said defendants were concerned.

A writ of scire facias was issued according to the terms of the information.

Thereupon the company, declaring that they severed in their

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pleading from the mise en cause, demurred to the said information, because, amongst other reasons, the remedy sought to be invoked by the informant, to wit, the process of scire facias, cannot be applied except to set aside the letters patent themselves, which was not sought to be done in the present case.

The company also, without waiver of their demurrer, pleaded to the said information, and, amongst other things, alleged that it was specially false that the persons at whose request the said information was issued—that is to say, the defendants in the said actions—never participated in the application for the issue of the letters patent in question, nor ever subscribed for stock in the said company, and that, on the contrary, they and each of them did subscribe unconditionally to the capital stock thereof, and did either themselves or by their duly authorized agent petition for the issue of the said letters patent, and that the same were issued on the faith of the original unconditional subscription of the said persons, which had been transmitted and communicated to the provincial secretary or other proper governmental officer; that the said letters patent were issued on the 15th of July, 1880, were published according to law, and that the fact that the same were issued to the corporators mentioned therein was published in the leading daily newspapers then in the city of Montreal, which newspapers were at the time subscribed to or read by the said corporators and each of them; that the persons at whose instance the information was laid were persons of large reputed means, and that the fact of their being known and published as corporators in the said company contributed largely to the financial standing of the said company, and was thus an inducement to capitalists to make advances to the said company.

The action of La Banque against the defendant William G. Murray, together with the intervention of the said Thomas Darling and the information for the writ of scire facias, together with the proceedings in improbation and the motion to reject the evidence above mentioned, were heard in the Superior Court, before the Honourable Mr. Justice Loranger; and in or about June, 1886, the learned judge gave judgment in the said action, granting the motion for the rejection of evidence, and dismissing the application for annulling the letters patent, and ordering the

defendant William G. Murray to pay the amount claimed from him into the hands of the intervener, the liquidator of the said company, to be distributed according to law. Similar judgments were delivered in the Superior Court in the other actions.

In March, 1887, the Honourable Honoré Mercier, Attorney-General for the Province of Quebec, was by order of the Court of Queen's Bench substituted for the Honourable Louis Taillon.

The defendants and the Attorney-General respectively appealed against the said judgments, and the cases, having been consolidated by order of the Court of Queen's Bench, were heard in March, 1888, before the Honourable Sir Anthony Aimé Dorion, Knight, Chief Justice, and the Honourable Justices Tessier, Cross, and Church.

The said Court (dissentiente Tessier, J.), on the 19th of May, 1888, gave judgment reversing the judgment of the Superior Court on the information for the scire facias, and it was ordered that the letters patent should be repealed, cancelled, and annulled in so far as the defendants were concerned, and that the names of the defendants should be struck out of the said letters patent; and the actions of the appellant bank against the defendants were dismissed.

It has been agreed, for the purpose of this appeal, that the declarations, pleadings, evidence, and judgments in the consolidated cases are the same, mutatis mutandis.

Their Lordships concur with the majority of the judges of the Court of Queen's Bench in their findings of fact, as stated in their reasons. From these it appears that the defendants were never organized as shareholders, and that no allotment of stock was ever made to them; that they had proposed the formation of a joint stock company, which, however, was only to be put into operation on certain conditions, and especially that of obtaining a Government subsidy, without which it was distinctly understood that the company should not be formed; that the conditions not being fulfilled, they abandoned the project, and their names were never entered in the list of shareholders; that the bank did not lend money on their names, and was, therefore, in no respect led astray by the fact that their names were used without their permission; and furthermore, that

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the promoters acquiesced in the withdrawal of the defendants, and at a later period formally approved thereof, and that from the time of their severance from the project the defendants ceased to be considered or even reputed to be subscribers to the undertaking; that they were never notified of any further proceedings, nor were they ever required to pay any call; that they took no part in any further proceedings, and that their names were never entered in the stock ledger, nor in any book purporting to be kept in conformity with sect. 32 of the Statute of Quebec, 31 Vict. c. 25.

Their Lordships are of opinion that the names of the defendants were fraudulently inserted in the petition for the letters patent without their sanction or authority, and that the solemn declaration of Gerhard Lomer verifying that petition was false. There was therefore no ground for making them liable except the statements in the letters patent.

By Article 1034 of the Code of Civil Procedure for the Province of Quebec, it is declared that any letters patent granted by the Crown may be declared null and be repealed by the Superior Court—(1) where such letters patent were obtained by means of some fraudulent suggestion, or (2) where they have been granted by mistake or in ignorance of some material fact.

By Article 1035, all demands for annulling letters patent may be made by suits in the ordinary form or by scire facias upon information brought by Her Majesty's Attorney-General or Solicitor-General, or other officer duly authorized for that purpose.

By Article 1036 the information is served upon the person who holds or relies upon such letters patent, and is heard, tried, and determined in the same manner as ordinary suits; and by Article 1037 an appeal lies from the final judgment rendered upon the information.

The Court of Queen's Bench annulled the letters patent only so far as the defendants were concerned; but their Lordships are of opinion that the Code does not in such a case as the present authorize a partial annulment of letters patent. To annul the letters patent as to some only of the members of the corporate body in the present case would be to alter the constitution of the

corporation created thereby. If it could be annulled as to eight or ten of the shareholders, it might be annulled as to all but five, and thus the amount of the capital of the corporation, as intended by Her Majesty to be constituted, might be and would be materially diminished. In fact, by such a partial annulment, a corporation might be created quite contrary to Her Majesty's intention, and such a one as would be incapable of carrying into effect the objects intended by the letters patent.

The facts found shew that the grant of the letters patent and the recitals therein were obtained by means of a false and fraudulent suggestion, and are quite sufficient to warrant a total annulment of the letters patent. A material question was, however, raised by the demurrer to the information as to the construction of the prayer of the information and writ of scire facias. It was contended that there was no prayer to have the letters patent wholly annulled, and that the information and writ of scire facias merely asked for an annulment so far as the defendants were concerned. Their Lordships cannot put such a construction upon the words of the prayer. The information does not merely ask to have the letters patent declared fraudulent and void so far as the defendants are concerned, but to have them declared fraudulent and void, at least in so far as the defendants are concerned. The words "at least" make a great difference in the meaning. Their Lordships' construction of the prayer is this—that the Court should declare that the letters patent were fraudulent and void, but that if the Court should think fit to declare anything less, the least that should be declared should be that the letters patent were fraudulent and void in so far as the defendants were concerned.

It would be a great miscarriage of justice if the defendants should be held conclusively bound by a false recital in the name of Her Majesty in the letters patent obtained by means of a false and fraudulent suggestion, verified by a false affidavit, and should be compelled to pay the unpaid amount of shares for which they were never subscribers, and of which they were never the holders. Her Majesty has the right, under Articles 1034 and 1035 of the Code of Civil Procedure of Lower Canada, to demand, by her Attorney-General, the annulment and repeal of letters patent

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obtained by means of any fraudulent suggestion. Her Majesty's Attorney-General for the Province of Quebec, acting on behalf of Her Majesty, has by a recital in the information declared it to be his duty to protect the defendants against the unauthorized and fraudulent incorporation of them in the letters patent, and against the fraudulent and mistaken issue of the said letters patent, purporting to incorporate them with others as shareholders in the said Pioneer Beet-root Sugar Company; and he has, in the opinion of their Lordships, prayed on behalf of Her Majesty to have the letters patent declared fraudulent, null, and void. Their Lordships having decided that the letters patent cannot be partially annulled, are bound to advise Her Majesty to order that they be entirely annulled, and to amend the judgment of the Court of Queen's Bench, on the information for the writ of scire facias, in accordance with that view.

The letters patent being annulled, there is an end of the actions at the suit of the bank and of the interveners against the defendants as shareholders in the incorporated company. They are not liable to be sued as shareholders of the company in consequence of the return of nulla bona by the sheriff to the writ of execution issued upon the judgment recovered by the bank against the company as incorporated by the letters patent.

Their Lordships will humbly advise Her Majesty to amend the judgment of the Court of Queen's Bench on the information for the writ of scire facias, by ordering the letters patent to be entirely repealed, cancelled, and annulled, instead of ordering them to be partially annulled and repealed as therein specified, and to order the said judgment to be affirmed in all other respects.

Also to affirm the judgment of the Court of Queen's Bench in the several consolidated actions, including those portions of the said judgment which relate to the interventions and the interveners.

The appellants must pay the costs of this appeal.

Solicitors for appellants: *Ashurst, Morris, Crisp & Co.*
Solicitors for respondents: *Bompas, Bischoff, Dodgson, & Coxe.*

[PRIVY COUNCIL.]

SHAW, SAVILL AND ALBION COMPANY PLAINTIFFS;

AND

THE TIMARU HARBOUR BOARD. . . DEFENDANTS.

J. C.*
1889
Dec. 3, 4, 6, 10.
1890
April 30.

ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND (CANTERBURY DISTRICT).

Law of New Zealand—Timaru Harbour Act, 1876—*The Harbours Acts*, 1878 and 1886—*Powers of the Harbour Board—Pilotage Contract—Statutory Liability.*

Held, that the respondent harbour board, as constituted by the Timaru Harbour Act, 1876, and the Harbours Act, 1878, had no authority under the statutes or the rules thereunder made to enter into pilotage contracts, but only to license pilots. Consequently it could not be held responsible for the default of its harbour master, who was acting not as harbour master but as pilot engaged by the appellants for their vessel, at the time when vessel and cargo were lost.

APPEAL from an order of the Court of Appeal (June 5, 1888), whereby a verdict obtained by the appellants for £15,500 and £17,302 16*s.* 8*d.*, the values of the appellants' ship *Lyttelton* and cargo was set aside, and judgment was entered for the respondents with certain specified costs.

The respondents were a body corporate under the Timaru Harbour Act, 1876, and the Harbours Act, 1878, and were sued for the above-mentioned sums as damages for the negligence and default of their servant, Storm, the deputy harbour master and pilot, who was in charge of the *Lyttelton* at the time when vessel and cargo were wholly lost. To this action they pleaded the general issue, denying all the allegations in the statute of claim, and further that all their alleged acts and defaults took place after the Act of 1878 had come into operation, and that no notice in writing had been given one month before action as required by sect. 227, nor had the action been brought within the three months prescribed by the said section. They further denied

* *Present*:—LORD CHANCELLOR, LORD BRAMWELL, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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that the vessel was under their care or control. They admitted that under the Harbours Act, 1878, and certain bye-laws thereunder made, they had jurisdiction over and within the port or harbour of Timaru. They alleged that if Storm rendered any such services as alleged, he did so merely on behalf of the plaintiffs, and not as the servant of the defendants; that no pilotage district had been created, and no pilotage rates were charged by the defendants, and that the services rendered by Storm were gratuitous; that the proximate cause of the loss was the negligence of the master and crew of the plaintiffs' vessel, or the negligence of the master of the steamship *Grafton*, in tow of which vessel (engaged by the plaintiffs' agents) the *Lyttelton* was, shortly before the accident causing her loss, and that after the sinking of the vessel she and her cargo might have been saved by the exercise of due care and skill on the part of the plaintiffs, their servants or agents.

The verdict of the jury was as above stated; but leave was reserved to the defendants to move for a nonsuit or to enter a verdict and judgment for the defendants, or to reduce the damages by the value of the cargo. The defendants moved accordingly, and also for a new trial on the ground of the discovery of new evidence; and these motions by consent were removed into the Court of Appeal, which directed judgment to be entered for the defendants on the ground of want of notice of action. The Court, however, decided against the defendants on the other points, and directed them to pay the costs of the action, which on taxation amounted to £1462.

On the appeal being entered as above stated, the respondents prayed for special leave to enter a cross-appeal. A consent order was made thereon, "that in the event of the Board on the principal appeal entering upon and disposing of the merits of the case apart from any question of want of notice, the respondents in principal appeal shall not be prejudiced as regards the matter of costs, by reason of their not having presented a cross-appeal."

Finlay, Q.C., and *J. F. Clerk* (*Batten*, with them), for the appellants, contended that the order appealed from was erroneous,

first, so far as it was held by the majority of judges that no notice of action as required by sect. 227 of the Harbours Act, 1878, had been given. It was contended that it had been proved that Ritchie, the appellants' agent on the spot, had sufficient powers to give the necessary notice; that he had instructed a solicitor to give such notice, and that in accordance with such instructions notice of action was duly given by him to the respondents on the 9th of August, 1886; that on the 9th of September a warrant to sue authorizing the said solicitor to act on behalf of the appellants, was sealed in London, and two days afterwards the action was commenced. This notice was sufficient, because Ritchie's authority in that respect as appellants' agent in New Zealand was to be implied from the nature of his agency and the circumstances of the case: see *Robertson* v. *Hamilton* (1). The authority of such an agent at a distance was analogous to that of a master of a ship at a distance. If Ritchie had no authority, then the notice given on the 9th of August was in the first instance invalid; but it was subsequently ratified and adopted by the appellants, and such ratification was valid and effectual: see *Bolton* v. *Lambert* (2); *Buron* v. *Denman* (3); *Hull* v. *Pickersgill* (4); *Whitehead* v. *Taylor* (5). These authorities shew that the doctrine of ratification applies even if ratification has the effect (1.) of divesting a right of action which had vested in a plaintiff; (2.) of divesting an estate; (3.) of making the plaintiff a wrongdoer. As to (2.) see *Lord Audley* v. *Pollard* (6), cited in *Lyell* v. *Kennedy* (7). Reference was also made to *Right* v. *Cuthell* (8); *Doe* v. *Walters* (9); *Doe* v. *Goldwin* (10); *Goodtitle* v. *Woodward* (11); *Roe* v. *Pierce* (12); *Bird* v. *Brown* (13); *Solomons* v. *Dawes* (14); *Coore* v. *Calloway* (15); *Coles* v. *Bell* (16); *Hagedorn* v. *Oliverson* (17).

(1) 14 East, 522.
(2) 41 Ch. D. 295.
(3) 2 Ex. 167.
(4) 1 B. & B. 282, 286.
(5) 10 A. & E. 210.
(6) Cro. Eliz. 561.
(7) 14 App. Cas. 437, 462.
(8) 5 East, 491, 496.
(9) 10 B. & C 626, 632.
(10) 2 Q. B. 143.
(11) 3 B. & Ald. 689.
(12) 2 Camp. 96.
(13) 4 Ex. 786.
(14) 1 Esp. 82.
(15) 1 Esp. 115.
(16) 1 Camp. 478, n.
(17) 2 M. & S. 485.

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Sir *H. Davey*, Q.C., and *Kennedy*, Q.C. (*Lush*-*Wilson*, with them), for the respondents, contended, in reference to the preliminary point, that no sufficient notice of action had been given either in respect of the loss of the ship or of the cargo. The alleged notice was bad, insufficient, and invalid. Neither Ritchie nor the solicitor had authority from the appellants to give it, or to accept or reject on their behalf a tender of amends, or to commence an action. The act of the solicitor in giving a notice under such circumstances never was and could not be ratified by the appellants. No subsequent ratification by them could make the solicitor's notice effectual, from its date or otherwise, as against the respondents, within sect. 227 of the Act of 1878. The cases cited on the other side relate mainly to questions between landlord and tenant. They are dealt with by the Courts on the broad ground that the notice must be such that the tenant can safely act on it. None of the cases cited related to statutory obligation. Reference was made to Story on Agency, sect. 246 (8th ed.); *Doe* v. *Walters* (1); *Jones* v. *Phipps* (2). Another class of cases relates to the possibility or effect of ratification after the time for doing an act has expired: *Bird* v. *Brown* (3); *Lewis* v. *Read* (4); and *Lord Audley* v. *Pollard* (5). A notice of action is a money demand, and must be made by a person with power to give a receipt: *In re Isaac* (6). Ritchie was not called as a witness to prove that he was authorized to instruct the solicitor to give this notice. Reference was also made to *The Oriental*; *Wallace* v. *Fielden* (7); *Australasian Steam Navigation Company* v. *Morse* (8); *Kleinwort, Cohen & Co.* v. *Cassa Marittima of Genoa* (9). As to the authority of a ship's husband at a distance, see *Campbell* v. *Stein* (10); Abbott on Shipping (12th ed.), p. 62. See also *Cook* v. *Tullis* (11). With reference to the insufficiency of proof of this notice, it was contended that an authority to demand must not merely exist; it must be strictly made out and proved: see *Charrinton* v. *Johnson* (12).

(1) 10 B. & C. 626.
(2) Law Rep. 3 Q. B. 567.
(3) 4 Ex. 786.
(4) 13 M. & W. 834.
(5) Cro. Eliz. 561.
(6) 3 My. & Cr. 319.
(7) 7 Moore, P. C. 398.
(8) Law Rep. 4 P. C. 222.
(9) 2 App. Cas. 156.
(10) 6 Dow. H. L. 116.
(11) 18 Wallace, 332.
(12) 13 M. & W. 856.

Finlay, Q.C., replied.

The case was then argued on its merits.

The counsel for the respondents contended that on the evidence Storm was acting as pilot, but was not in that capacity a servant of the respondents so as to make them liable for his acts or omissions. There was no statutory obligation on the respondents; nor had they the power to provide pilotage or appoint pilots; nor was there any obligation arising from receipt of remuneration by the respondents. It was ultrà vires for them to make themselves or their public funds responsible for any default. Even if Storm was acting as the respondents' servant, yet inasmuch as his services were as between the appellants and respondents gratuitous, and Storm was not guilty of gross negligence, the respondents were not liable. Storm, moreover, was not acting as harbour master when the loss occurred; if he had been, he had no authority from the respondents, but only from the appellants, to navigate the vessel. It was not within the scope of his authority derived from the respondents to navigate the vessel. Reference was made to the harbour regulations and bye-laws entitled, "Schedule B and Bye-laws." Further, it was contended that there was evidence of contributory negligence; and that Storm had shewn error of judgment but no negligence; and that his salary was not paid by pilotage dues, but out of harbour fund: see sects. 49, 93, and 113 of Act of 1878. Further, the appellants were merely carriers and bailees, and could not in this action sue for and recover the value of the cargo. Reference was made to *The Rhosina* (1), and *Holman* v. *Irvine Harbour Trustees* (2), cited by the Court below; *The Milan* (3); *The Minna* (4).

[THE LORD CHANCELLOR:—The appellants need not argue the question of Storm's negligence or of contributory negligence.]

Counsel for the appellants contended that the harbour board was liable, and referred to sect. 49 of the Act of 1878, which gives power to appoint and employ a harbour master, pilots, and other officers and servants to be paid out of the harbour fund; to sect. 76, which gives power to employ licensed pilots; sects.

(1) 10 P. D. 24, 131. (2) Quarter Sessions Cas., 4th Series, vol. iv. p. 409.
(3) 31 L. J. (Adm.) 105. (4) Law Rep. 2 A. & E. 97.

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the harbour master in his capacity of administering the shipping in and about the harbour, may be true enough. But their sole duty as constituted by statute, in respect of pilots was to license pilots, between whom and themselves the only relation which the law contemplated as existing was that they should be under their supervision and under their jurisdiction for the purpose of being duly licensed; but once licensed the pilot had to make his own bargain with the shipowner, and would incur in that contract of pilotage only his own personal liability for the due performance of his duty. The statute and the rules made under it seem carefully worded so as to exclude the notion that the harbour board, in its corporate capacity, is acting as pilot for the vessels frequenting the harbour, and their Lordships are of opinion that what is not permitted to the harbour board under the statute is prohibited; they are not therefore authorized to pledge public funds for the purpose of entering into private engagements, and cannot be held responsible for the default of their harbour master, who in fact was acting as pilot for the vessel, not in the view their Lordships take of the facts as harbour master, but as pilot engaged by the parties themselves, and who was only himself personally liable for acting in the capacity of pilot, though he happened to fill the character of deputy harbour master at the same time.

The facts of the case are peculiar in this respect, that the transaction in question was out of the ordinary course of duty in more aspects than one. It would be intelligible that the harbour board should with their own tug and harbour master aid vessels in entering or departing from the harbour, having taken care that both their harbour master and the appliances at his command were sufficient for the purpose of effecting the object desired. In this case the tug boat (by which the harbour board were in the habit of assisting vessels as they did) was out of repair; the parties, at their own risk, appear to have employed a steam tug not the property of or habitually under the command of the harbour master. And, when it is remembered that the accident itself happened partly by reason of the inappropriateness of the steam tug employed for the purpose, it is not an unimportant topic for consideration that even the ordinary practice of the harbour board, whether authorized or not by law,

was not the practice in following which this accident happened, but the error of the pilot in attempting to conduct an operation by a vessel not used by the harbour board, and inappropriate for the purposes for which it was selected by the parties now complaining.

Their Lordships, however, are of opinion that, even had the misfortune happened in the use of the steam tug according to the ordinary practice and by the person who, as a matter of fact, was the harbour master, the harbour board had no authority to enter into such a contract, as they were not entitled by statute themselves to become pilots, but only to license others for that vocation.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed, and that the judgment of the Court of Appeal of New Zealand should be varied by entering judgment for the defendants, and that the appellants pay the costs of the suit and of this appeal.

Solicitors for appellants: *Waltons, Bubb, & Johnson.*
Solicitors for respondents: *Longbourne, Stevens, & Powell.*

[PRIVY COUNCIL.]

J. C.* 1889 Nov. 8; Dec. 14. 1890 July 12.

THE "CITY OF PEKING" . . . . . DEFENDANTS:

AND

THE COMPAGNIE DES MESSAGERIES MARITIMES AND OTHERS . . . . . } PLAINTIFFS.

THE "CITY OF PEKING."

ON APPEAL FROM THE VICE-ADMIRALTY COURT AT HONG KONG.

Collision—Damages—Demurrage—Loss of Profits—Expenses of Detention.

Indemnity for consequential loss from detention of a vessel can only be recovered where there has been actual loss resulting therefrom, and reasonable proof of its amount.

In estimating damages resulting from a collision, *held*, that a claim for demurrage during the detention of the injured vessel in port whilst a substituted vessel, belonging to the same owners, was doing at the defendants' expense and indemnity for loss occasioned by the substitution, the work which the injured vessel ought to have done, must be disallowed.

The Black Prince (1 Lush. 568) distinguished.

Held, further, that so far as the claim for demurrage may have related to actual expenses incurred for the detained vessel, such as the lodging, maintenance, and wages of the crew, as distinct from loss of profits arising from loss of the use of the vessel, a reference should be made to ascertain them; not to the registrar of the Court below, but, under the circumstances of the case, to the Registrar of Her Majesty in Ecclesiastical and Maritime Appeals.

APPEAL from an order of the Vice-Admiralty Court (March 27, 1888).

The facts are stated in the judgment of their Lordships. The judgment in the principal appeal is reported in 14 App. Cas. 40.

Sir *Walter Phillimore*, Q.C., and *Walton*, for the appellants.

The *Attorney-General* (Sir *R. E. Webster*), and *Raikes*, for the respondents.

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

The cases cited were: *Jebsen* v. *East and West India Dock Company* (1); *The Black Prince* (2); *The Clarence* (3); *The Inflexible* (4); *The Argentino* (5).

Dec. 14. The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a decree or order of the Vice-Admiralty Court at Hong Kong of the 27th of March, 1888.

The point determined was the amount of damages which the respondents, the Compagnie des Messageries Maritimes, were entitled to recover in a suit instituted by them against the appellant, the steamship *City of Peking*, in respect of a collision which took place on the 29th of November, 1886, in the harbour of Hong Kong, between the said steamship *City of Peking* and the steamship *Saghalien*, of which the company were the owners.

In that suit the *City of Peking*, having been found to have been alone to blame, was condemned in damages and costs by a decree (subsequently affirmed by this Board), by which it was referred to the Registrar of the Court, to be assisted by merchants to ascertain the amount of damages and to report thereon.

The company brought in their claim, containing many items, amounting to 1491 francs 95 centimes, £6035 12*s.* 11*d.*, and $66,133. 25, of which the particulars are set forth in the appendix, together with interest thereon at $8 per cent. from the 29th of November, 1886, until payment.

One of the items of the claim is, "No. 50, demurrage for the steamship *Saghalien* from the 29th of November, 1886, to the 25th of January, 1887, being fifty-six days, £5352 4*s.*"

The *Saghalien* was a vessel of about 3823 tons gross, and M. de Champeaux, the agent of the company at Hong Kong, stated that he claimed demurrage at 6*d.* a ton a day on the gross tonnage.

The assistant registrar, on the 6th of February, 1888, after hearing both parties, reported that he allowed the amount, £5352 4*s.*, claimed for demurrage, and all the other items of

(1) Law Rep. 10 C. P. 300.
(2) 1 Lush. 568.
(3) 3 Wm. Rob. 283.
(4) Swab. 200, 204.
(5) 13 P. D. 61, 200; 14 App. Cas. 519.

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the plaintiffs' claim, with some comparatively slight deductions, which are not material to be considered with reference to the present appeal. The total so allowed being 1491 francs 95 centimes, £5819 6*s.* 9*d.*, and $66,068. 79, with interest at 8 per cent. until paid.

No objection was made to this report by the plaintiffs; but the defendant appellant, on the 21st of February, 1888, objected to the item allowed for demurrage. The appellant also objected to several other items, the objection to which has since been abandoned, and is therefore not now material. The objections were heard by the learned judge who delivered judgment thereon, and by an order dated the 9th of March, 1888, referred back the report to the registrar and merchants, with a direction to ascertain the number of days the *Saghalien* was prevented by the collision from taking up her position on her own day from Marseilles, referring, as will hereafter appear, to the 30th of January, 1887—a day on which the *Saghalien*, as one of a line of steamers belonging to the company, was appointed to commence a fresh voyage from Marseilles to Shanghai.

The deputy registrar assisted by the same merchants having in pursuance of the last-mentioned order heard both parties, together with fresh evidence, including an affidavit of M. de Champeaux, again reported to the Court on the 21st of March, 1888, that fifty-six days' demurrage be allowed, and also specified his reasons for such report. To that report the defendant on the 24th of March, 1888, objected, and contended that it should be varied, and that no demurrage ought to be allowed.

The learned judge having again heard the case on the 27th of March, 1888, without assigning any further reasons, pronounced the sums of 1491 francs 95 centimes, £5819 0*s.* 9*d.*, and $66,068. 79) to be due to the plaintiffs in respect of their claim, together with interest and costs. And he condemned the defendants and their bail in the said sums, interest, and costs. The sum of £5819 0*s.* 9*d.* so held to be due to the company includes the sum of £5352 4*s.* claimed by them and allowed by the first report for demurrage.

From that order or decree the present appeal has been preferred by the defendant upon the ground that no demurrage

ought to have been allowed, or in the alternative that the demurrage allowed was for too many days and at too high a rate, and also upon the ground that the rate of interest allowed was unreasonable. Their lordships in the course of the argument intimated their opinion that no objection having been made in the Lower Court in respect of the interest allowed the Appellant could not now support the appeal against such allowance.

The only question now to be decided is whether the defendant ought to be held liable for the £5352 4*s.* allowed for demurrage, or any part of that amount.

It was objected on behalf of the respondents on the argument of the appeal in support of the third reason of their case that the objection to the demurrage taken in the Court below was not to the rate or number of days, but that no demurrage at all was due, and that the rate and number of days were not objected to in the Court below, and were therefore not subject to appeal to Her Majesty in Council; but their Lordships are of opinion that that objection cannot be supported. The objection to the first report was that the report be varied, the following items (of which No. 50, "Demurrage for *Saghalien*, £5352 4*s.*, was one) being objected to." In the objection to the second report the language was, no doubt, altered, the objection being, "that the report be varied, and that no demurrage be allowed." Their Lordships are disposed to think that even if the latter objection stood alone the appellant would have been at liberty to contend that part of the sum allowed for demurrage ought to be disallowed, even though it might fail in shewing that no demurrage ought to be allowed; but reading the second objection, coupled with the first, they have no doubt that the appellant is at liberty to shew that the whole or some part of the item of £5352 4*s.* ought to be disallowed. In dealing with the case their Lordships consider that the plaintiffs must be held to their claim for demurrage, from the 29th of November, 1886, to 25th of January, 1887, or in other words, during the detention of the *Saghalien* at Hong Kong, and that they are not at liberty to claim as demurrage any detention of the vessel at Marseilles after her arrival there on the 25th of February, 1888, the 6*d.* a day claimed and allowed being limited to the period of her detention

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at Hong Kong, between the dates mentioned in item No. 50 of the claim.

There is no doubt as to the rule of law according to which compensation is to be assessed in cases of this nature, where a partial loss is sustained by collision. The rule is restitutio in integrum: *The Black Prince* (1). The party injured is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered. It does not follow as a matter of necessity that anything is due for detention of a vessel whilst under repair. In order to entitle a party to be indemnified for what is termed in the Admiralty Court a consequential loss resulting from the detention of his vessel, two things are absolutely necessary—actual loss and reasonable proof of the amount. *The Clarence* (2); *The Argentino* (3).

There is no dispute as to the principal facts as stated by the learned Judge.

"The *Saghalien* is one of the steamers of the company which run regularly every fortnight from Marseilles to Shanghai. These steamers are subsidized by the French Government to carry mails from France to China and the ports on that course, and to take return mails to France. The China terminus is Shanghai, and it is from there that they commence their return voyage homewards after staying for a time at Shanghai, something between a fortnight and three weeks it would seem from the evidence before the registrar.

"They also stop for a short time apparently at Marseilles after the completion of the round trip and before commencing a fresh voyage to China.

"On the 29th of November, 1886, the *Saghalien* was lying in the harbour of Hong Kong, having arrived from Shanghai two days before. She was homeward bound next day at noon. The *City of Peking* arriving with the American mails, in coming up to her anchorage, collided with and damaged the *Saghalien* so that she could not proceed on her journey to France, but had to be taken into dry dock. On the same day the steamship *Melbourne*, another of the company's steamers, arrived in Hong

(1) 1 Lush. 573. (2) 3 Wm. Rob. 283.
(3) 13 P. D. 61, 191.

Kong from Europe with passengers, mails, and cargo, and in the ordinary course would have proceeded to Shanghai on the following day. The agent of the company, M. de Champeaux, at once decided to send on the *Melbourne's* cargo, mails, and passengers by outside steamers to Shanghai, and to send the *Melbourne* back to Europe instead of the *Saghalien*. This decision was very promptly executed, and the *Melbourne*, having discharged her northern cargo, had transferred to her the *Saghalien's* cargo, passengers, &c."

The outward voyage of the *Saghalien* from Marseilles commenced on the 26th of September, 1886. If the collision had not taken place, she ought in ordinary course to have left Hong Kong on her homeward voyage on the 30th of November, 1886, and to have reached Marseilles about the 3rd of January, 1887, and according to the arrangements of the company would have remained there unemployed until the 30th of January in that year, when she was timed to take her turn and to start upon a fresh outward voyage to Shanghai. In consequence, however, of the collision she was detained at Hong Kong until the 25th of January, 1887, fifty-six days after the collision. She left on that day, arrived at Marseilles on the 25th of February in that year, and remained there unemployed until the 27th of March, when she again sailed for Shanghai.

The *Melbourne* left Hong Kong on the 2nd of December, 1886, two days after the *Saghalien* ought to have started; she arrived at Marseilles in due course early in January, 1887, and remained there unemployed until the 30th of that month, on which day she took the turn which, but for the collision, would have been taken by the *Saghalien*, and sailed on a fresh outward voyage for Shanghai.

The *Melbourne* having been substituted for the *Saghalien* on the homeward voyage, was necessarily prevented from continuing her outward voyage to Shanghai and back, and other arrangements had to be made for carrying on to that port the mails, passengers, and cargo of the *Melbourne*, and for her return voyage to Marseilles. These arrangements were attended with very considerable expense, in addition to the loss sustained by the withdrawal of certain passengers and freight, booked by the

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Melbourne from Hong Kong to Shanghai; but the whole of these expenses and losses were included in the Plaintiff's claim, and have been allowed both by the assistant registrar and by the judge, in addition to the claim of £5,352 4*s.* for demurrage.

As to the homeward voyage from Shanghai, which would have been made by the *Melbourne* if she had not been substituted, M. de Champeaux, in his affidavit of the 18th of March, 1888, says:—

"The company's steamship *Amazone*, instead of remaining at Shanghai, according to the time-tables of the company, until the 6th day of January, 1887, was despatched from Shanghai on the 23rd day of December, 1886, to supply the place of the steamship *Melbourne*; and the plaintiff company's steamship *Yangtse*, instead of remaining in Shanghai until the 20th day of January, 1887, was despatched from Shanghai on the 6th day of January, 1887, in the place of the said steamship *Amazone*.

"The company's steamship *Volga* was taken off the Hong Kong and Japan line, and was despatched from Shanghai on the 20th day of January, 1887, in place of the said steamship *Yangtse*, and she carried the mails, passengers, and cargo to Hong Kong, where they were transhipped into the said steamship *Saghalien*, thus enabling that vessel to sail on the 25th of January, 1887, for Marseilles; otherwise the said steamship *Saghalien* would have had to proceed to Shanghai for the mails, passengers, and cargo, which would have caused her to leave Marseilles again two weeks later than the 27th day of March, 1887, the day she did leave.

"The company's steamers usually remain at Shanghai for about seventeen to twenty-one days, in order to thoroughly overhaul their engines and machinery, and in consequence of the earlier despatch of the said steamships, *Amazone* and *Yangtse*, as aforesaid, they were only at Shanghai about three or four days, and the usual overhaul of the engines and machinery could not be and was not effected.

"The company's steamers usually remain at Marseilles for about four weeks after their arrival before being again despatched to China."

M. de Champeaux, in his affidavit of the 9th of January, 1888, paragraph 15, also stated that, in consequence of the detention of

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the steamship *Saghalien* she lost her turn in the line of mail steamers, and the company suffered great inconvenience, and incurred heavy loss, both pecuniarily and in reputation; but on cross-examination he says:—

"I do not know if any loss has actually occurred. Loss might have occurred by the steamers not staying long enough at Shanghai to clean their engines. The service of the steamers was also made irregular. We were exposed to a claim from the French Government.

"If there had been no collision the *Melbourne* would have got to Shanghai about the 3rd of December, and would have stayed about fourteen days there, and ought to have left here, i.e., Hong Kong, on the 28th of December. The *Yangtse* probably left on the 28th of December. The next steamer to the north after the *Melbourne* was the *Yangtse*. These steamers were turned round at Shanghai. So far as profits were concerned the Compagnie lost nothing. The crew and officers are engaged for the voyage, and some of the crew are discharged at Marseilles. Taking the *Volga* off did not interfere with the service from Yokohama to Hong Kong. I cannot say what extra expense was caused by taking the *Volga* off her proper voyage. I do not know if any actual gains were lost to the company by the change of steamers, nor can I say what actual expenses were incurred."

There appears to be a slight mistake in the statement that the *Yangtse* was the next steamer north after the *Melbourne*; for it appears from a later affidavit, as already stated, that the *Amazone* was the next, and the *Yangtse* the next after the *Amazone*, and that the *Amazone* was the steamer which supplied the place of the *Melbourne* on the 23rd of December; but the mistake does not in the least degree alter the case.

M. de Champeaux again says:—

"The *Saghalien* is three times as large as the *Volga*. If I had sent the *Saghalien* up to Shanghai instead of using the *Volga* the expense would have been more, as a fortnight would have been lost. If I had sent the *Saghalien* the *Volga* would not have come down to Hong Kong. Whilst in dock other steamers were earning the profits of the *Saghalien*. I did not hear of any cargo being shut out at Shanghai."

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It seems clear that no damage was sustained by the company in consequence of the *Melbourne's* not having completed her outward voyage and been at Shanghai for her return voyage. The profits of her homeward voyage, though earned by other steamers, were earned by other steamers of the company and for the company.

As to the sending of the *Volga* to Shanghai to carry the mails, passengers, and cargo from thence to Hong Kong to be reshipped on board the *Saghalien*, and carried by her to Marseilles on her voyage which commenced on the 25th of January, it seems clear that no damage has been sustained by the company, as all the expenses of the *Volga* were claimed by the company and have been allowed by the judge, the sums allowed being £433 4*s.* 4*d.* and $624. 77.

The learned judge, on allowing these amounts, remarked: "The allowance for the *Volga* in connecting the Shanghai end of the line with Hong Kong is most moderate, and seems to me to have been the cheapest service that could have been rendered for the *City of Peking*."

The learned judge was mistaken in treating the case of *The Black Prince* (1) as analogous to the present. The two cases are very different. In *The Black Prince* (1) the vessels belonged to different sets of owners, so that the profits earned by one ship belonged to one set of owners, and the profits earned by a different ship to another set of owners; whereas in the present case the profits earned, whether by one ship or another, all belonged to the company.

Again, in the case of *The Black Prince* (1), the arrangement as to the turns fixed for the voyages to be made by several ships was made by the several owners, each set of owners having a distinct interest in having the arrangement adhered to so that their ship might be employed in its proper turn; no set of owners had the power to alter the turns allotted without the consent of all the others. In the present case the order in which the ships were appointed to leave Marseilles was one made for the company's own convenience and to preserve regularity in the departure of their own vessels. It could be changed or varied at any moment

(1) 1 Lush. 568.

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at the will of the company in the case of emergency, or if the interests of the company appeared to them to require it; and, in fact, it was very properly changed by M. de Champeaux in consequence of the inability of the *Saghalien* to proceed on her voyage.

It appears to their Lordships that all the damages sustained by the company in consequence of the substitution of the *Melbourne* were included in the claim brought in before the registrar, allowed by him, and finally sanctioned by the Court. The *Melbourne* and her crew having been substituted for the *Saghalien* and her crew on her homeward voyage, at what may now be termed the expense of the defendant, was very properly, and perhaps necessarily, allowed to take the turn of the *Saghalien* on the next outward voyage from Marseilles on the 30th of January, 1887.

The company lost nothing, so far as the use of the ships was concerned, by substituting the *Melbourne*; for if she had not been engaged on the homeward voyage she and her crew would have been occupied during the whole time in completing the voyage on which she was engaged at the time of the substitution.

It would be very unjust to charge the defendant £95 a day or anything for the loss of the use of the *Saghalien* during her detention at Hong Kong for the time during which the *Melbourne* and her crew were doing at the defendants' expense the work which the *Saghalien* and her crew ought to have done. This includes the period from the 2nd of December, 1886, to the day in January, 1887, on which the *Melbourne* arrived at Marseilles. No loss was sustained by the company by the detention of the *Melbourne* from the day of her arrival at Marseilles to the day of her departure therefrom, for it was in consequence of the arrangements of the company that she remained unemployed during that period; so also no loss was sustained by the company in consequence of the *Saghalien's* not having been in Marseilles from the 3rd to the 30th of January, 1887, as but for the accident she ought to have been; for if she had been there she would have been lying unemployed and earning nothing, in accordance with the company's own arrangements.

The learned judge was clearly in error in referring back the

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report by his first judgment to the registrar and merchants with a direction to ascertain the number of days the *Saghalien* was prevented by the collision from taking up her position on her own day, and to amend their report on the principles indicated, without directing them to ascertain whether the company sustained any loss in consequence. In giving that direction he was acting entirely upon the case of *The Black Prince* (1), without adverting to the difference between that case and the present. He said: "It may turn out that there were fifty-six days' delay; but although the *Araxes*" (referring to the injured ship in the case of *The Black Prince* (1)), "was thirty-eight days in dock, she was only allowed twenty-eight days' demurrage, such being the number of days she was prevented from taking her place on the line; in other words, that she was not earning money for her owners."

The case went before the deputy registrar, Mr. Sangster, a different officer, and the same merchants, who reported that fifty-six days' demurrage be allowed.

The report is not very clear; but reading the whole report together it seems to their Lordships that the deputy registrar attributed the demurrage to the fifty-six days during which the *Saghalien* was in dock at Hong Kong, and not to any portion of the time during which she was unemployed at Marseilles.

Be this as it may, the learned judge, acting upon the report without giving any further reasons than those in his first judgment, and apparently under the erroneous impression that this case was governed by the ruling in the case of *The Black Prince* (1), allowed the sum of £5352 4*s.* claimed for demurrage, being at the rate of 6*d.* per ton upon the gross tonnage of the *Saghalien*, or about £95 a day for each of the said fifty-six days, and this without proof that any loss had been sustained by the company in consequence of that demurrage.

It has been shewn that the company has claimed and been allowed all the damage sustained in consequence of the inability of the *Saghalien* to proceed on her homeward voyage on the 30th of November, 1886, so far as the loss by the company of the use of the vessel was concerned.

(1) 1 Lush. 568

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M. Champeaux very properly, and, as it appears to their Lordships, correctly stated, "that, so far as profits were concerned, the company lost nothing," and also, "that whilst in dock the other steamers were earning the profits of the *Saghalien*." The learned judge, however, remarked that that statement required some explanation, and added, "Should they have nothing for those services? I have stated why I think they ought to have," without adverting to the fact that he was allowing in other items of the claim all the expenses which had been incurred in consequence of the substitution of the *Melbourne*.

Their Lordships are of opinion that the decree or order appealed against ought to be reversed so far as it allows the sum of £5352 4*s*. claimed for demurrage, with interest thereon and costs. M. Champeaux stated in his affidavit of the 9th of January, 1888, that the portage bill of the steamship *Saghalien*, whilst lying at Hong Kong during the time she was being repaired, amounted to from £95 to £100 a day, and that it could not have been reduced. There seems, however, to be some mistake in that statement, unless the portage bill, the items of which are not before their Lordships, included the $53,000 claimed and allowed for the repairs of the vessel. Their Lordships are of opinion that the amount claimed and allowed for demurrage, so far as it includes any damage on account of the loss of the use of the *Saghalien*, ought to be disallowed. They cannot, however, say that the company may not have incurred some expenses in respect of the *Saghalien*, such, for instance, as the lodging, maintenance, and wages of the crew, and, it may be, other expenses incurred during the period of her detention which would not have been incurred if she had not been detained. These may have been included in No. 50, the item claimed for demurrage; and, if so, their Lordships think that the plaintiffs are entitled to recover them under that item: see *The Inflexible* (1).

It would be very inconvenient, and would be attended with considerable expense to the parties, to send this case back to the registrar at Hong Kong. The head office of the company is in France, and they will doubtless be able to supply the necessary

(1) Swab. 204.

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information and affidavits as to the items of the portage bill, and as to the nature and extent of the necessary and reasonable expenses, if any, incurred at Hong Kong with reference to the *Saghalien* during her detention there.

Their Lordships are not prepared to make any report to Her Majesty before it shall have been ascertained whether any and what expenses of the nature above indicated were incurred by the company. They, therefore, refer it to the Registrar of Her Majesty in Ecclesiastical and Maritime Appeals to ascertain and report whether, having regard to the above remarks, any and what expenses were properly incurred by the company with reference to the steamship *Saghalien* during her detention at Hong Kong between the 29th of November, 1886, and the 25th of January, 1887, in addition to the several items included in the claim made by the company at Hong Kong exclusive of that for demurrage in No. 50; and if the registrar find that any such expenses were necessarily and properly incurred, then to report the amount and the several items thereof.

All further questions, including the question of costs, are reserved.

The Plaintiffs must bring in their claims in writing before the Registrar of Her Majesty in Ecclesiastical and Maritime Appeals within the space of one month from the 14th day of December, 1889, or within such further time as the said registrar may allow.

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On the 12th of July, 1890, the report of the registrar came on for consideration;* and a final judgment was delivered by SIR BARNES PEACOCK, the same counsel being present as before:—

Upon the hearing of this appeal their Lordships declared their opinion that the decree or order appealed against ought to be reversed, so far as it allowed the sum of £5352 4*s.* claimed for demurrage, with interest thereon and costs; but they added that they could not say that the company might not have incurred some expense in respect of the *Saghalien*, such, for instance, as lodging, maintenance, and wages of the crew, and, it might be,

* *Present*:—LORD WATSON, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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other expenses incurred during the period of her detention, which would not have been incurred if she had not been detained, and their Lordships referred it to the Registrar of Her Majesty in Ecclesiastical and Maritime Appeals to ascertain and report to this Board in respect of those matters.

Their Lordships having considered the report of the registrar, and the evidence adduced before him, are of opinion that the whole of the sum claimed for demurrage ought to be disallowed, and that the respondents have not shewn that they are entitled to any sum in substitution thereof.

Under these circumstances, their Lordships will humbly advise Her Majesty that the decree or order appealed against ought to be reversed, so far as it allows the sum of £5352 4*s.* claimed for demurrage, with interest thereon and costs, and that in other respects it ought to be affirmed. The respondents must pay the costs of this appeal, including the costs of the reference to the registrar, and of the motion to this Board consequent upon his report.

Solicitors for the appellants: *Trinders & Co.*
Solicitors for the respondents: *Gellatly & Warton.*

[HOUSE OF LORDS.]

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JOHN THOMAS NORTH . . . . . APPELLANT;

AND

ROBERT STEWART . . . . . RESPONDENT.

Jurisdiction—Arrestment ad fundandum jurisdictionem—Judgment for Costs—Solicitor's Lien—Act 23 & 24 *Vict. c.* 127, *s.* 28.

The appellant, a domiciled Englishman, being defendant in an action in the Queen's Bench Division, obtained, on the 25th of April, 1887, judgment for costs against W., the plaintiff, who was a domiciled Scotchman.

On the 26th of May the respondent executed in Scotland an arrestment ad fundandam jurisdictionem against W. of the amount due under the judgment, and his summons was served on the appellant on the following day.

On the 13th of June the appellant's solicitors in the action in the Queen's Bench Division obtained a charging order under 23 & 24 Vict. c. 127, s. 28, upon the costs recovered by him in the action:—

Held, affirming the decision of the Court of Session (16 Court Sess. Cas. 4th Series (Rettie) 927), Lord Morris dissenting, that even assuming that the charging order was retrospective in its operation, the arrestment was effectual for the purpose of founding jurisdiction, as such arrestment could in no way affect the operation of the charging order.

APPEAL from an interlocutor of the First Division of the Court of Session, Scotland (1).

John Thomas North, the appellant, an Englishman, having no other property in Scotland except the sum in question, had been the defendant in an action brought against him by one Welsh, a domiciled Scotchman, in the Queen's Bench Division in England.

On the 25th of April, 1887, the Queen's Bench Division gave judgment in the defendant's favour with costs. These costs, when taxed, amounted to £419 11*s.* 4*d.*

On the 26th of May, 1887, Stewart, the respondent, for the purpose of founding jurisdiction in Scotland against North, served the following arrestment of all funds in his hands upon Welsh:—

"I, George Nicolson, messenger-at-arms, by virtue of letters of arrestment, ad fundandam jurisdictionem, dated and signeted the

(1) 16 Court Sess Cas. 4th Series (Rettie), 927.

twenty-third day of May, eighteen hundred and eighty-seven years, raised at the instance of Robert Stewart, farmer, Elibank, near Peebles, complainer, against John Thomas North, sometime merchant at Pisagua, in the Republic of Peru, and now residing at Eltham, in the county of Kent, the only individual partner in Great Britain of the now dissolved firm, or joint adventure, which carried on business under the name of North & Speedie in Peru —In Her Majesty's name and authority, lawfully fence and arrest in the hands of you, John Welsh, Esquire, solicitor, Supreme Courts of Scotland, Edinburgh, the sum of £5000 pounds sterling, more or less, due and addebted by you to the said John Thomas North, or to any other person or persons for his use and behoof, by bond, bill, decree, contract, agreement, or by any manner of way whatsoever; together also with all goods, gear, debts, sums of money, rents of lands and houses, and every other thing presently in your hands, custody, and keeping, pertaining and belonging to the said John Thomas North, all to remain in your hands under sure fence and arrestment, jurisdictionis fundandæ causâ, conform to said letters, in all points.—This I do upon the twenty-sixth day of May, eighteen hundred and eighty-seven years," &c.

On the 27th of May, 1887, the respondent served a summons for a money claim upon the appellant, and on the same day the fund due for costs was again arrested on the dependence of the action. It is not necessary for this report to give the facts of this claim; but the appellant alleged that it was Welsh who had caused the arrestments to be used in his own hands at the apparent instance of the respondent, as assignee of a claim alleged by another.

The appellant's solicitors, Messrs. Eldred & Bignold, on the judgment being given by the Queen's Bench Division for his costs, applied to Welsh's solicitors for payment, in order that they might satisfy their own bill of costs. Welsh's solicitors having failed to pay, a certificate of the judgment of the Queen's Bench Division, dated the 31st of May, 1887, was registered on the 1st of June in the books of Council and Session in Scotland in the name of the appellant, under the Judgments Extension Act, 1868.

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On the 13th of June, Messrs. Eldred & Bignold, who had not been paid their costs, obtained from the Queen's Bench Division a charging order under the 28th section of the Act 23 & 24 Vict. c. 127 (1) upon the costs recovered in the above-mentioned action between Welsh and the appellant.

On the 14th of June this charging order was intimated to Welsh. Thereupon he raised an action of multiplepoinding to determine who had right to the fund arrested.

On the 21st of July, 1887, the appellant lodged his defences to Stewart's action, pleading his solicitors' lien on the fund; and that consequently, the arrestments not having affected any property of his, were inept to found jurisdiction.

On the 2nd of December, 1887, the Lord Ordinary (the late Lord Lee) repelled the plea by the appellant of no jurisdiction, and allowed the parties a proof in the whole cause.

On the 20th of December, 1887, the First Division recalled the Lord Ordinary's interlocutor, and remitted the case back to the Outer House to allow the appellant a proof of his averments in support of his plea of no jurisdiction.

By order of the Lord Ordinary (Lord Kinnear) a case was prepared for the opinion of English counsel upon the question, amongst others, of what was the effect, if any, either at Common Law or under the provisions of the 28th section of 23 & 24 Vict.

(1) It is enacted by the 28th section of the 23 & 24 Vict. c. 127: "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the Court or Judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or Judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or Judge shall appear just and proper, and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bonâ fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right."

c. 127, upon the respective rights of the solicitors and the appellant of the charging order, and, in particular, had it any retrospective effect upon their respective rights.

The opinion was to the effect that the charging order conferred a valid title on the solicitors under the statute, and that such charging order had a retrospective effect.

On the 3rd of November, 1888, the Lord Ordinary (Lord Kinnear) found that the arrestments used by the respondent, in the hands of Welsh, were ineffectual to found jurisdiction, and dismissed the action. On the same date, in the action of multiplepoinding, he found Messrs. Eldred & Bignold entitled to the fund in medio of £419 11*s.* 4*d.*

The respondent having lodged a reclaiming note against these interlocutors, the First Division of the Court of Session recalled, on the 14th of June, 1889, the first of the above judgments, and repelled the plea of no jurisdiction; and in the action of multiplepoinding their Lordships affirmed the decision of the Lord Ordinary (1), and this decision was not appealed against.

On appeal,

June 30, July 14. *The Dean of Faculty* (*Balfour*, Q.C., and Sir *Horace Davey*, Q.C. (with them *W. Blake Odgers* and *Kennedy*, the latter of the Scotch Bar), for the appellant:—

The arrestment here was of no effect to found jurisdiction in Scotland. By the law of Scotland the test whether property is liable to arrest so as to found jurisdiction is whether it is of such a character as can be taken in execution or made available for a real diligence, and if there is not an interest in the foreign defender which the Court can ascertain with justice to others the jurisdiction is at an end. See Lord Mure in *Wyper* v. *Carr & Co.* (2); Bell's Dictionary, "Arrestment"; Erskine, 1, 2, 19. And it was said in *Lindsay* v. *London and North Western Railway Company* (3) that the property arrested must not be illusory.

(1) 16 Court Sess. Cas. 4th Series (Rettie), at pp. 927, 935.

(2) 4 Court Sess. Cas. 4th Series (Rettie), 444.

(3) 3 Macq. 99.

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According to the English counsel's opinion, the charging order under the 28th section of the 23 & 24 Vict. c. 127 (the Solicitors' Act), conferred a valid title upon the solicitors, and was retrospective to the date of the judgment and rendered the arrestment ab initio void; see on this point *Dallow* v. *Garrold* (1). This lien had priority over the attachment. In equity the solicitor always had a lien on a judgment debt of this character. The statute gave a new remedy which the judgment creditor's solicitor can pursue by a specified course and by which he can get an order to charge the fund gained by the action. The interest which the appellant had in this judgment debt was a right burdened with a lien of a strictly legal character in favour of his solicitors; and he could do nothing with it until they were paid. The respondent also had no right to make the fund available, because the moment he attempted to do so the right of the solicitors stepped in, and their costs were much more than the judgment debt.

[LORD HERSCHELL referred to *Hough* v. *Edwards* (2).]

Again the arrester must be taken to have had notice of this lien. In *Cameron* v. *Chapman* (3) it was said that these arrestments to found jurisdiction ought not to be carried further than is expressly warranted by authority. The Lord Ordinary, referring to *Wall's Trustees* v. *Drynan* (4), said it was held there that the question raised by a plea to jurisdiction is not whether the Court had jurisdiction over the defender at any antecedent time, but whether it has jurisdiction de presenti at the time when the objection is taken, and that in accordance with that decision the question is to be determined with exclusive reference to the state of rights at the time when the defences are lodged. That is, that though at the time the arrestment was executed it could not be known whether the defender's right to the property could be defeated; but that when it was known at the lodging of defences that it was defeated by the charging order, then the jurisdiction was at an end.

(1) 14 Q. B. D. 543, at p. 546.
(2) 1 H. & N. 171.
(3) 16 Court Sess. Cas. 1st Series (Shaw), at p. 918.
(4) 15 Court Sess. Cas. 4th Series (Rettie), 359.

Asher, Q.C., of the Scotch Bar (with him *Wilson*, of the same Bar, and *Le Breton*), for the respondent:—

The judgment obtained in England by the appellant was registered in Scotland, and was equivalent to a Scotch judgment at his instance against Welsh, so that the appellant was the creditor of Welsh for the debt. It cannot be disputed that when a person resident in Scotland is the debtor of a person out of that jurisdiction the debt can be arrested; also, that if the parties are entitled to an account, then also the arrestment to found jurisdiction is good, although it turn out afterwards that the arrestee in Scotland owed nothing. The Lord Ordinary mistook the sense of what the Lord President said in *Wall's Trustees* v. *Drynan* (1). In that case the Lord President intended to hold that the date, in point of time, when the jurisdiction is established is not when the defences are lodged, but when the summons is signeted. If the arrester has once effectively served the summons, there is jurisdiction throughout the suit. As to the lien of the solicitor, it was held in *Mercer* v. *Graves* (2), that all the attorney had was a plea for the protection of the Court. And in *Brunsdon* v. *Allard* (3), Lord Campbell said, that the attorney's lien did not prevent the parties from coming to a reasonable arrangement. In fact, the lien of the solicitor is only an equity; if he gets the fund into his hands he can take the costs out of it. The arrestment to found jurisdiction was not in competition with, nor intended to defeat the charging order; therefore the effect of the 28th section of the Act 23 & 24 Vict. c. 127, does not affect the present question.

[LORD MACNAGHTEN observed that the language of sect. 28 was explained by the fact that the main object of the section was to amend the law as laid down in *Shaw* v. *Neale & Co.* (4), and that probably the section was intended to give solicitors a lien for costs over real estate.]

Douglas v. *Jones* (5) shews what kind of fund or right may be attached; there it was decided that if there be primâ facie

(1) 15 Court Sess. Cas. 4th Series (Rettie), 359.
(2) Law Rep. 7 Q. B. 499.
(3) 28 L. J. (Q B) 306, at p. 308.
(4) 6 H. L. C. 592.
(5) 9 Court Sess. Cas. 1st Series (Shaw), 856.

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evidence of a debt due, that is sufficient to found jurisdiction, and that the Court will not go into accounts to see whether there is a debt or not: see also *Lindsay* v. *London and North Western Railway Company* (1); *Baines & Tait* v. *Compagnie Générale des Mines d'Asphalte* (2). *Cameron* v. *Chapman* (3) shews that no nexus was laid on the fund in arrestment to found jurisdiction, that arrestment being used only to create the jurisdiction.

Sir *H. Davey*, in reply.

LORD HALSBURY, L.C.:—

My Lords, it appears to me that the dates of the various steps in this litigation may be simply and very conveniently collected from page 5 of the respondent's case. On the 25th of April, 1887, the defendant, Colonel North, got judgment for costs in the plaintiff, Mr. Welsh's, action. On the 26th of May arrestment in Welsh's hands was used at the respondent's instance to found jurisdiction against the appellant. In truth, the whole question appears to me to resolve itself into this, whether at the time when that arrestment was used, there was a subject-matter capable of being taken in execution—not necessarily so taken in execution as ultimately to bear fruit to pay the debt—but whether there was at that time a subject capable of being taken in execution. As to that, it appears to me, my Lords, that there is really no doubt. The judgment is recovered by Colonel North; it is Colonel North's judgment. It is true that a counter-claim may be made against him by Eldred & Bignold, the attorneys, in respect of their costs. I deliberately use the term "counter-claim," because it is not true to say that it was a lien or anything which in strictness is a lien known to our law; but it was a claim which the attorneys might have enforced against their principal. That it ultimately became a charge under the powers of the statute seems to me to be immaterial; the whole question in debate appears to be this, whether the fact that there was a claim against that judgment which Colonel North

(1) 22 Court Sess. Cas. 2nd Series (Dunlop), 571, at pp. 591, 593, 595; affirmed 3 Macq. 99.

(2) 6 Court Sess. Cas. 4th Series (Rettie), 846.

(3) 16 Court Sess. Cas. 1st Series (Shaw), 907.

had recovered vacates a jurisdiction which is created by the possession of some subject-matter capable of being taken in execution in Scotland.

Now, looking at the authorities, the cases which have been quoted, it seems to me absolutely hopeless to contend that because that claim might have been defeated by the attorneys setting up their claim against Colonel North, therefore it was not Colonel North's property at that time and capable, if the attorneys had not intervened, of being used for any purpose for which Colonel North desired that the judgment should be used. If I understand the judgments of all the learned Judges in the Court below, including the Lord Ordinary, their view is that when once the jurisdiction has been properly founded no subsequent matter can take it away. The question, therefore, whether it is properly founded or not depends upon the question whether it was Colonel North's judgment and not the attorney's judgment. As to that, I can entertain no doubt that it was Colonel North's judgment, and that, therefore, the jurisdiction which depended on that question was well founded.

The argument upon the statute seems to me to raise more important questions, which, I think, it is hardly necessary to decide in this case, for the reason that I pointed out to Sir Horace Davey, that it appears to me that under no circumstances can it be said that it delays or defeats or in any way affects the order obtained by the solicitors under the circumstances of this case. I myself should be very sorry, without further consideration, to give such a construction to the statute itself as that which Sir Horace Davey contended for. I very much doubt whether it would be possible to put such a construction upon it as would give it an operation such as that which is contended for, by which the charging order would defeat something which had perfectly bonâ fide taken place before and on which the charging order would have a retrospective effect. But, as I have said, it seems to me quite unnecessary to decide that question in this case looking to the facts. Under those circumstances, it appears to me that the charging order obtained by the solicitors could not be affected or defeated by that which had served its purpose at the time when that charging order was made, and that it in no

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way affected the right of preference between themselves of the different persons claiming this fund.

Under these circumstances, it appears to me very plain that the interlocutor of the Court below ought to be affirmed, and this appeal dismissed with costs.

LORD WATSON:—

My Lords, since the facts of this case were explained by counsel, I have seen no reason to doubt that the judgment appealed from is in accordance with Scotch law, and ought, therefore, to be affirmed by the House.

The Dean of Faculty relied, in argument, upon a statement of the law in Erskine's Institutes (I. 2, 19), a work of great authority, to the effect that an arrestment of moveable property in Scotland belonging to a foreigner, used to found jurisdiction against him, has the effect of creating "a jurisdiction in our Supreme Court, to judge in a personal action against the foreigner, proceeding upon an edictal citation, for constituting the debt due by him to the arrester, *in order to pronounce a decree of furthcoming against those in whose hands arrestment was used.*" To obtain a decree of furthcoming, which is a transference of the thing arrested to the arrester, may be the ultimate object contemplated by the arrester; and that is probably all that the learned author meant to affirm. If he intended to represent that object, as being the only purpose or effect of an arrestment jurisdictionis fundandæ causâ, his statement is plainly inaccurate, and is not borne out by *Hardie* v. *Laddel* (1), which he refers to as justifying the text, because the only expression of judicial opinion in that case is contained in the finding that "the arrestment on the sheriff's warrant founded a jurisdiction to the Court of Session." If the arrester desires to make the moveable which he has attached available for satisfaction of any decree which he may obtain against the foreign defender, he must use a second arrestment on the dependence of his action, in order to interpel the person in whose hands it is laid from parting with the moveable, until the action is at an end; and, if and when he gets a

(1) Mor. Dict p. 4830.

decree, he must use a third arrestment in execution; and it is only in the latter proceeding that he can obtain a decree of furthcoming against the arrestee.

It appears from the case of *Young* v. *Arnold* (1), which is cited by Mr. Erskine in the passage already referred to, that the Court of Session, at the time when his treatise was written, was in use to grant special warrants for arresting, jurisdictionis fundandæ causâ, moveables belonging to a foreigner "ay and while he should find caution judicio sisti et judicatum solvi." An arrestment in these terms might, unless loosed by the Court, on security being given for payment of any sum which might be found due to the arrester, continue to attach until final decree was pronounced in the action. But, in modern practice, warrants are issued in the form of that used by the respondent in the present case, which bears that the goods, gear, debts, &c., to be arrested are to remain in the hands of the arrester "under sure fence and arrestment, jurisdictionis fundandæ causâ." The sole purpose and effect of an attachment in these terms is to fix the locality of the subjects arrested in Scotland, and thereby to render their foreign owner liable to be convened in a process issuing from the Court of Session, at the instance of the arrester, for recovery of a personal debt. Whenever the foreign owner has been duly made a party to that process, the arrestment is spent, and the arrestee is no longer, as in a question with the arrester, under any obligation to retain in his hands the moveables which it affected. It is a sufficient answer to any charge of breach of arrestment, to shew that the foreign owner has been made liable to the jurisdiction of the Court of Session, in a competent suit at the arrester's instance founded on the arrestment.

I observe that it was pleaded in the Court below, and the plea is repeated in the appellant's case, that the jurisdiction of the Court of Session over a foreign defender is not complete, unless the arrestment to found jurisdiction was subsisting and effectual at the time when his defences to the action became due. That point, which was the main ground upon which the Lord Ordinary gave judgment in favour of the appellant, was not pressed in the

(1) Mor. Dict. 4833.

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argument addressed to us; and is based on a misconception of what was decided by the First Division in the recent case of *Wall's Trustees* v. *Drynan* (1). In my opinion, the punctum temporis which must be looked to, in considering whether the foreign defender has been effectually made subject to the jurisdiction of the Court, is the date of his citation upon the summons. If, at that date, there is a valid arrestment jurisdictionis fundandæ causâ against him, and the writ is duly served, the action has commenced, and the jurisdiction of the Court over the defender, in that suit, is fully constituted. When jurisdiction has been thus constituted, it requires nothing to support it, beyond the fact that the defender was answerable to the Court, at the time when he was served with its process. After that date another creditor of the defender having parata executio may carry off the subject arrested or it may perish; but the action already begun will not, in either of these cases, abate through defect of jurisdiction. That appears to me to be a principle which applies to the exercise of jurisdiction by all Courts, irrespective of the particular circumstances which originally gave them jurisdiction. When a party has been competently brought into Court, he cannot thereafter escape from its jurisdiction, by reason of circumstances supervening, which, had they originally existed, would have exempted him from its process.

In this case, the respondent used his arrestment on the 26th of May, 1887, and his summons was served edictally upon the defender on the following day. The debt arrested was a sum of £419 11*s.* 4*d.*, being costs of suit for which the appellant had obtained a judgment of the Queen's Bench Division against the arrestee on the 25th of April, 1887. On the 13th of June, seventeen days after the execution of the summons, Messrs. Eldred & Bignold, the appellant's solicitors in the suit in which the judgment for costs was given, obtained a charging order, in terms of 23 & 24 Vict. c. 127, s. 28.

The main contention of the appellant has been that the arrestment of the 26th of May did not attach any moveable estate belonging to him. That objection usually takes the form of an

(1) 15 Court Sess. Cas, 4th series (Rettie), p. 359.

assertion that at the date of the arrestment there was no sum due to the objector by the arrestee—an assertion which, if proved, is fatal to the validity of the arrestment. But the appellant was, at that date, a judgment-creditor of the arrestee; and he was therefore driven into maintaining, that the arrestment was inept, because Messrs. Eldred & Bignold had a lien by way of hypothec over the debt. That is a somewhat startling proposition, and one for which there is no authority whatever. Assuming that their lien, when charged by the order of the 13th of June might operate in the same way as an intimated assignation by the original judgment creditor, and terminate his interest in the debt; so long as the debt remains his property, the mere existence of a lien does not exclude the diligence of others having claims against him. The opinions expressed by the English Bench in *Hough* v. *Edwards* (1) and *Mercer* v. *Graves* (2) appear to me clearly to shew that, in the Courts of Common Law, a solicitor's lien upon costs decreed does not, until it is converted into a charge by virtue of the statute, prevent their attachment by other persons having claims against the judgment creditor.

The debt in question having been validly attached by the respondent on the 26th of May, its assignment by way of charge to Eldred & Bignold on the 13th of June could not per se affect the jurisdiction previously constituted by service of the summons. The appellant argued, however, that the respondent's arrestment has been made void, ab initio, by the retrospective operation of the statute, and that the citation which followed upon it has consequently become ineffectual. Sect. 28 enacts that "all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bonâ fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right." It is not necessary to consider to what acts, other than those of the judgment creditor, the enactment was meant to apply, because it cuts down no act which does not prevent the charge from taking full effect. An arrestment on the dependence, or an arrestment in execution, followed by a decree of furthcoming may be within its provisions; but these cannot apply to an arrestment

(1) 1 H. & N. 171 (2) Law Rep. 7 Q. B. 499.

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jurisdictionis fundandæ causâ, which does not in any way obstruct the efficacy of the solicitor's charge.

Upon these grounds I concur with the judgment which has been moved by the Lord Chancellor.

LORD HERSCHELL:—

My Lords, I am of the same opinion. As I understand the law of Scotland, in order to found jurisdiction it is necessary that there should exist in Scotland a subject-matter belonging to the foreigner capable of being arrested, and that this condition of things should continue down to the time when the suit is commenced by process. When once these conditions are satisfied the arrestment to found the jurisdiction ceases to have further effect; it no longer binds the property or in any way restrains future dealings with it.

In the present case there did exist a judgment debt due to Colonel North from Mr. Welsh, and I do not understand it to be disputed that this was a sufficient subject-matter within the rule applicable to such cases; and that if there had been nothing more in the case than this the arrestment would undoubtedly have been good and the jurisdiction well founded.

The case of the appellant rests entirely upon the fact that the judgment debt was obtained in an action in which Messrs. Eldred & Bignold were the solicitors to Colonel North, and that their costs in that action had not been satisfied by Colonel North, and that they had therefore a lien upon the sum recovered to satisfy those costs. I do not understand it to be contended that the mere existence of this common law lien would have been sufficient to prevent the arrestment, for the purpose of founding jurisdiction, of the debt due from Welsh to North—indeed, upon the authorities which were cited to us by Mr. Asher on behalf of the respondent, such a contention would appear to be hopeless. But the appellant rests his case upon the provisions of a statute which enables the solicitor to obtain a charging order, and upon the fact that a charging order was obtained under the provisions of that statute. It is said that the charging order has a retrospective effect given to it by the language of the statute. My Lords, the argument of the appellant raises some very serious

considerations with reference to the extent of that retrospective operation, upon which it does not appear to me to be necessary to pronounce any opinion in the present case. Assuming to the fullest extent the retrospective operation contended for, what does it come to? The statute provides that any acts done to defeat, or any acts which would operate to defeat the charge, shall be void. It cannot be said to have any greater effect than that; and therefore unless it can be shewn that there is some act which would operate to defeat the charge there is nothing to be avoided by giving the fullest effect to the statute.

Now the arrestment to found jurisdiction clearly could not in any way operate to defeat the charge, inasmuch as at the time when the charge was obtained it was capable of having just as full and complete effect as if there had never been an arrestment to found jurisdiction. That being so, it is obvious that the statute could have no possible effect, and I really am hardly able to follow the argument that because a charging order was obtained under this statute therefore there was not at the time of the arrestment and down to the time when the process was issued a subject-matter, namely the debt due to Colonel North, in existence capable of being arrested and sufficiently arrested for the purpose of founding jurisdiction.

LORD MACNAGHTEN:—

My Lords, I agree in the view expressed by my noble and learned friends who have preceded me and in the motion proposed by the Lord Chancellor.

LORD MORRIS:—

My Lords, I regret extremely that I am obliged to come to a different conclusion. I accept entirely the law enunciated by my noble and learned friend opposite, Lord Watson, as regulating these matters in Scotland; and I accept it in this way, that the point of time to be considered is when the citation by summons was served upon the defender. If at that time there were matter which brought him within the jurisdiction of the Scotch Courts, it could not be avoided by subsequent events, apart of course

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from any question upon the Solicitor's Statute, which is another branch of the case.

Well, to found this arrestment, which gives jurisdiction to the Scotch Courts, as I understand it, there must be a subject-matter existing in the country, the property of the defender, the person who is sought to be brought within the jurisdiction of the Scotch Courts. In this case, by the arrestment citation, it is stated to be a debt; the words are: "On the 26th day of May, 1887, the sum of £5000 sterling, alleged to be due and addebted by the pursuer, the said John Welsh, to the defender, the said John Thomas North, was arrested in the hands of the pursuer by Robert Stewart;" "and on the following day, viz., on 27th of May, 1887, the sum of £5000 was arrested in the hands of the pursuer, in virtue of a precept of arrestment contained in a summons at the instance of the said Robert Stewart against the defender, the said John Thomas North." The question, therefore, appears to me to be relegated to this: Was there, on this 26th day of May, which, as I say, is the date of this arrestment order, a debt due to John Thomas North by John Welsh? I am of opinion that there was not, in the sense in which, as I understand it, there would be a debt due by one person to another, namely, that it could be made capable of execution and of being realized. Colonel John Thomas North appears to have got a judgment in this country, in England, against Welsh, for costs. He was the defendant in a suit brought by Welsh. Therefore, the only judgment which he could get, being a defendant, or did get, was for costs in an action brought against him; and it is so stated in the judgment, that the judgment was for the costs of the suit, primâ facie the property of the attorney—at all events popularly so, unless the defendant in that suit, Colonel North, paid them. That judgment is registered in Scotland; and upon the face of it it states that it is a judgment for costs.

Now, what is the position between Colonel North and Mr. Welsh as regards that judgment, which Colonel North had so obtained against him for the costs of the action which he had brought against Colonel North? As I understand it, it is admitted, that if a trustee obtained a judgment, and registered it in Scotland; and if he were a bare trustee for some other

person in this country, in England, it could not be contended (and I believe it was not contended) that it would be a debt which could be arrested for the purpose of founding jurisdiction, because it would be merely a nominal judgment on the record, and the amount ought to go to his cestui que trust. On the other hand, I am free to admit that, if there were an ordinary debt between Colonel North and Mr. Welsh, upon the authorities, according to this so-called contrivance for creating jurisdiction, there would be jurisdiction, and this arrestment notice would be good. But this is an intermediate case, in which, although Colonel North was creditor in a judgment which, primâ facie, he would have been entitled to levy from Mr. Welsh, and which I quite concede Mr. Welsh was entitled to pay him if he did not receive notice, still it was a debt of this character, that there was an inchoate right in the solicitors at any moment to swoop down and say that the debt should be paid to them; and if they gave notice to Mr. Welsh, and if after that notice he paid Colonel North, they could go to Mr. Welsh and make him pay them over again, if they had not been paid by Colonel North. Therefore, in my judgment, there never was at any time such a debt as that the relation of debtor and creditor existed unconditionally between Colonel North and Mr. Welsh.

My Lords, I should be quite content to base my judgment upon that simple ground; but if I had to resort to the statute, I should also be of opinion that this was not an act which operated to defeat, but an act done to defeat the claim of Eldred & Bignold. It certainly was done with that object, because Welsh had contested in the multiplepoinding suit the right of Eldred & Bignold; and this was the very inception of the transaction which gave him a right to dispute all through that action the right of Eldred & Bignold to recover the amount. My Lords, while I am of opinion that it was an act done to defeat the right of Eldred & Bignold, I rest my own judgment upon being clearly of opinion that this was never a debt due by Welsh absolutely to Colonel North such as was capable of being unconditionally realized by execution at all. There was this inchoate and hovering right of Eldred & Bignold to swoop down upon it and claim it as theirs.

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Upon these grounds I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

The interlocutor appealed from affirmed, and the appeal dismissed with costs.

Lords' Journals, 14th July, 1890.

Agents for the appellant: *Eldred & Bignold, for Alexander Campbell, S.S.C., Edinburgh.*

Agent for the respondent: *A. Beveridge, for J. & A. Hastie, Edinburgh.*

[HOUSE OF LORDS.]

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LAIDLAY AND OTHERS (TRUSTEES) . . . APPELLANTS;

AND

THE LORD ADVOCATE . . . . . RESPONDENT.

Revenue—Probate Duty—Partnership—Local situation of business in England or India.

In an action for probate duty it appeared that the deceased had been member of a partnership firm. By the articles of partnership it was provided that the business should be the carrying on and working of certain silks and indigo concerns, and zemindaries for the production or manufacture or working of indigo and silk and other produce, and for the sale in Calcutta or shipment for realization in Europe of such produce. The articles further provided that the entire business of the firm in India should be carried on by certain managing agents who were required to be partners, who were alone entitled to use the name of the firm, to keep the books, and prepare the balance-sheets, and who were also empowered (but subject to the opinion of the committee hereinafter mentioned) to determine what branches of business should be undertaken. A committee of the partners in England was appointed to advise with the agents both in London and Calcutta on all matters affecting the interest of the partnership, and subject to the approval of a general meeting of the partners to decide all matters affecting the partnership. It was further provided that on the death of any partner his representatives should not become partners in respect of his share, but that the interest of the deceased partner should cease from the 30th of September next after his decease, with power for the representatives to sell the share within a stipulated period or else to receive its fair value. A firm in London were declared to be the agents of the partnership in Europe, to whom the produce

of the firm was to be consigned and the proceeds of the sales in India were to be remitted. The London agents were to make the advances necessary for carrying on the business, and held a mortgage over the assets, which were vested in trustees resident in the United Kingdom. The estates cultivated by the firm were situate in India, and the business properly so called was entirely carried on there. There were sixteen partners, all but two of whom resided in the United Kingdom:—

Held, reversing the decision of the Court of Session (16 Court Sess. Cas. 4th Series (Rettie), 959), that the share or interest of the deceased in the partnership was not property situated in the United Kingdom, and was therefore not liable to probate duty.

APPEAL from interlocutors of the First Division of the Court of Session, Scotland (1).

The late John Watson Laidlay, who had been for a considerable time engaged in business in India, died on the 8th of March, 1885, in Scotland, where he resided, possessed, among other personal property, of three thirty-second shares in the partnership concern of Robert Watson & Co., of Calcutta. The appellants were his trustees and executors, and they, under a deed of agreement executed in this country, dated the 22nd of September, 1885, sold these three shares to the three sons of the testator, the sons agreeing each to buy from their father's trustees and executors at the price of £9000 each, one undivided thirty-second share of and in the real and personal property and other assets of the said partnership of Robert Watson & Co. The sale was confirmed by the partners under art. 25 of the partnership deed, and the sons' names were entered in the company's books as partners.

In the return of the personal estate of the deceased in the United Kingdom, for the purpose of probate duty, the appellants stated at the end of the inventory, under the head "Abroad," that there was a sum of £25,221 4*s.* 3*d.*, alleged to be the testator's share "in the real and personal estate, as a partner, in the firm of Robert Watson & Co., as valued by the agents of the company." Payment of probate duty on the value of this asset of the testator was not paid here, but probate duty was paid in India upon it as an Indian asset.

The question was, whether probate duty in the United Kingdom was payable in respect of the value of this part of the

(1) 16 Court Sess. Cas. 4th Series (Rettie), 959.

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testator's estate. The Lord Advocate, the respondent, raised this action on behalf of the Crown, contending that it was, and claimed £756 additional probate duty.

The concern of Robert Watson & Co. carried on business under a deed of co-partnery, dated August, 1877, which was a renewal of prior contracts.

The contract of 1877, the contract current at the date of Mr. Laidlay's death, was in the form of an indenture entered into between sixteen gentlemen, seven of whom were given as then resident in England, seven in Scotland, and two in India.

The preamble of the deed of partnership declared that the capital of the partnership consisted of real and personal estate in India, and that it was vested in three trustees, all named, and resident in the United Kingdom, two being partners and one a partner in Matheson & Co. It then recited a mortgage to the London agents, Messrs. Matheson & Co., to cover advances.

The articles provided as follows:—

(2.) That the business should be the carrying on and working of indigo and silk concerns, and zemindaries for the production or manufacture or working of indigo and silk and other produce, and for the sale in Calcutta, or shipment for realization in Europe of such produce.

(4.) All the shares should be deemed to be of the nature of personal estate.

(5.) That the term should be for five years certain, to be extended to another five years, unless a majority of the partners decided otherwise.

(6.) The capital was to consist of the real and personal property and other assets of the then existing partnership, as the same may be scheduled at the balance of the 30th of September, 1877; but, as it was of a fluctuating character, it was to be taken for the purpose of declaring dividends to be assumed to be of the value of £240,000.

(7.) The style or firm of the partnership was to be "Robert Watson & Co."

By article 8 the said style or firm of "Robert Watson & Co." might be used by Messrs. Jardine, Skinner & Co., or other the managing agents for the time being, and under the authority in

writing of such managing agents, but not otherwise, by the Mofussil managers in all dealings or transactions, and in all actions and suits by and against the company, and in all other matters which can be conducted in the name of the firm; but the partners, or any of them as such, should not be at liberty to use the said style or firm for any purpose or on any pretext whatever. Then, in case of any suit, &c., the names of the trustees might be used.

Article 9 provided that five partners named should constitute a committee to advise with the agents, both in London and Calcutta, and to decide, subject to the approval of a general meeting of the partners, on all matters affecting the interest of the partnership, and also to decide as to calling, when necessary, a meeting of the partners. Three of the committee were to constitute a quorum.

"(10.) Messrs. Jardine, Skinner & Co. are hereby constituted the managing agents of the partnership in India, and the entire business of the partnership there shall be carried on by them as such managing agents, subject to the provisions herein contained, but only so long as the said firm of Jardine, Skinner & Co., or some or one of the partners therein, shall in their or his own right hold or be entitled to at least two thirty-second shares in the property of the partnership hereby constituted. And upon such qualification as aforesaid ceasing, a majority of the partners in this partnership may, by notice in writing to Messrs. Jardine, Skinner & Co., six months before the month of September in any year, revoke the appointment of managing agents hereby made as from the 1st day of October following; and by the same or any other writing may appoint any other person or persons to be such managing agent or agents, upon such terms and with such power and authorities as they shall think fit.

"(11.) Messrs. Jardine, Skinner & Co., as such managing agents, shall have all powers necessary for the efficient carrying on of the business thereof, and are hereby expressly empowered (but subject to the opinion of the committee, whenever it shall have been expressed) to decide whether all the said branches of business shall be carried on, or which of them, and to what extent: Provided always that no branch of business not

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heretofore undertaken by the partnership shall be taken up without the consent, previously obtained, of the committee. The said managing agents shall also determine the amount of the outlay to be expended in the business and concerns of the partnership in each year, and the mode and terms of disposal of the produce thereof, and have power to appoint and remove all persons in the employment of the partnership in India, and to give to such persons all such powers, including a power of substitution, as the said Messrs. Jardine, Skinner & Co. may from time to time think proper. And further, the said Messrs. Jardine, Skinner & Co. are hereby authorized to enter into all contracts necessary for the carrying on of the business of the company, to institute and defend all suits in which the partnership may be concerned, and also to compromise any such actions or suits, and to compound any debts due to the partnership, or other claims or demands, and to refer any claim or demand of or against the partnership to arbitration, and generally to manage the said estate, and conduct all the affairs in India of the said partnership, and do and execute all such acts, matters, and things as they shall deem necessary.

"(12.) All moneys which shall be borrowed from Messrs. Matheson & Co. for the purpose of the partnership, and for carrying on the said concerns, shall be drawn for by Messrs. Jardine, Skinner & Co. only, and in their own names, and not in the name of the partnership or of the firm thereof, and all the money which shall be required to be remitted to the various concerns of the partnership shall be supplied by Messrs. Jardine, Skinner & Co., and all the produce of the concerns of the partnership shall be received and disposed of by them.

"(14.) All the necessary books of accounts of the partnership shewing the receipts and payments, and assets and liabilities of the partnership shall be kept by Messrs. Jardine, Skinner & Co., as the managing agents, at their usual place of business in Calcutta, and shall be at all times open for the inspection of the partners.

"(15.) As soon as practically after the 30th of September in each year, and the realization of the produce of the season, the managing agents in Calcutta shall prepare a general account or

balance-sheet shewing the result of the operations of the partnership during the year ending on that day, and the nett profit or gross loss after paying or providing for all the outlay, expenses, and engagements of the year of every kind, shall be appropriated as follows: the profits, to the extent of 8 per cent. on the capital, shall be carried to the account of the respective partners in the books of the partnership in proportion to their respective shares; the excess of the profits beyond 8 per cent. shall be set apart and paid to the London agents to form and afterwards maintain a reserve fund not exceeding £50,000, and after the same shall have been formed to keep it up to that amount. All surplus profit when the reserve fund amounts to £50,000 shall be carried to the credit of the several partners in proportion to their respective shares.

(18.) As remuneration Messrs. Jardine, Skinner & Co. were to be entitled to a commission of 2½ per cent. on the proceeds of sale of all the produce in each year whether in Calcutta or in Europe, they paying thereout all the Calcutta charges and expenses of managing the business of the partnership.

"(19.) The said Messrs. Matheson & Co. are hereby declared to be the agents of the partnership in Europe, the entire business of which therein shall be transacted through them and all the produce of the partnership shall be consigned to them, or if sold in India the proceeds shall forthwith be remitted to them. The said Messrs. Matheson & Co. shall supply the necessary funds for the current advances of each season, whether for working the estates, the production of indigo, silk, or other produce, and the same shall be on the security of the mortgages and covenants contained in the indentures of mortgage and confirmation hereinbefore referred to. Any further expenditure of moneys, whether for the purchase of new concerns, or for land tenures, or for advances made to secure leases of property, or for any extraordinary expenditure under the heads of law proceedings, land surveying, machinery, or otherwise, shall be provided in such manner as the managing agents shall from time to time determine.

"(20.) Messrs. Matheson & Co. shall be entitled to interest on the general cash balance which may be due to them at the rate of £5 per cent. per annum, so long as such balance shall not

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exceed £150,000, and at the minimum rate charged by the Bank of England for the time being for discounts (when above 5 per cent.) on any sum which may exceed that amount; they shall also be entitled to a commission of 2½ per cent. on the sales of the produce of the season, whether such sales are made in India or in Europe.

"(21.) No partner or partners shall contract any debt, or draw, accept or indorse any bill or note, or transact any business in the name of the partnership, nor shall any of the partners not being a majority of the partners in any manner interfere with the conduct of the business of the partnership by Messrs. Jardine, Skinner & Co., or Messrs. Matheson & Co., respectively, but all powers for controlling, regulating, ordering, and managing the affairs of the partnership, which consistently with these presents may be exercised by all the partners for the time being, may be exercised by a majority of the partners."

(24.) Any partner during his life might sell his shares to any person approved by the committee.

Article 25 provided: "That the bankruptcy, insolvency or death of any partner shall not cause a dissolution of the partnership as among or between the other partners." . . . That the representatives of any deceased partner, &c., should not become a partner in respect of any share of such partner . . . but "the interest of such deceased partner or his representatives in the said profits and losses shall cease on the 30th of September next after his decease, or, if he shall die on the 30th of September, then shall cease on such day of his decease, and the share of such bankrupt, insolvent or deceased partner shall be ascertained and dealt with in manner following, that is to say, if the trustees, assignees, or representatives of such bankrupt, insolvent or deceased partner shall desire to sell such share to any of the partners or to any other person, such other person to be approved by the committee, the same may be sold accordingly for such price or value as may be agreed upon; but if such trustees, assignees, or representatives shall not desire to sell such share, or shall not within six calendar months after such bankruptcy, insolvency, or death find a purchaser whom the committee shall approve and complete the sale to some other partner or to such other person, then and in

such case the fair value of the share of such bankrupt, insolvent or deceased partner on the 30th of September, on which his interest is to cease as aforesaid, shall be determined by Messrs. Matheson & Co., and upon such trustees, assignees, or representatives executing such transfer or assignment as hereinafter mentioned, but not otherwise, the trustees of the partnership shall pay or cause to be paid or secured as hereinafter mentioned the sum so determined as aforesaid, . . . and the trustees or assignees of such bankrupt or insolvent partner or the representatives of such deceased partner shall be bound upon such valuation being made by Messrs. Matheson & Co., and upon or before receiving such payment or security as aforesaid, to execute to the said trustees of the partnership or to a purchaser thereof, approved by the committee, a transfer or assignment of the entire share of the bankrupt, insolvent or deceased partner in the partnership property, and in the case of a deceased partner the trustees of the partnership or purchaser taking his share as aforesaid shall enter into a covenant with the representatives to indemnify the estate of such deceased partner from all liabilities in respect of the share so taken."

Article 26 will be found in Lord Herschell's opinion, and by Article 35 Messrs. Matheson & Co. were irrevocably appointed arbiters.

Admissions, to avoid the necessity of a proof, were made by the parties as to the course of business.

(1.) Of the parties who signed the articles of 1877, two were resident in India and executed them there.

(2.) The meetings of the committee named and appointed by article 9, took place in London in the office of Messrs. Matheson & Co., and were summoned by Matheson & Co., acting in concert with the chairman of the committee who was resident in England.

(3.) The financial year of the partnership closed in terms of article 15 on the 30th of September in each year; and as soon as possible thereafter, Jardine Skinner & Co., on the footing that there was sufficient profit, passed a dividend at the rate of 8 per cent. to the credit of each partner's account in the books of the partnership. Messrs. Matheson & Co. were advised

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thereof, and requested to make and did make, payment of the dividend to the partners respectively. . . . The partners resident in Great Britain were generally in the habit of holding an annual meeting in the course of each summer, when convenient to the general body of the partners and irrespective of the distribution of the accounts and dividend. These and other meetings were held at Messrs. Matheson & Co.'s office. At these annual meetings the partners discussed the accounts and the general prospects of the company. Decisions were given by the general body of the partners at their annual meeting upon points connected with the business, submitted to them for that purpose by the managing agents in India through the committee.

(5.) The firm of Jardine, Skinner & Co., of Calcutta, or some or one of the partners therein, held two shares in the partnership as required by Article 10. Matheson & Co. were not required to hold, and did not hold any shares; but a partner of Matheson & Co. was one of the three trustees resident in this country in whom the property of the partnership of Robert Watson & Co. was vested.

(6.) Jardine, Skinner & Co., as managing agents in India, conducted the practical working of the indigo and silk concerns and zemindaries for the production and manufacture of indigo, silk, and other produce. In terms of article 11 they appointed and discharged the whole staff of servants in the employment of the company in India, and exercised the powers therein conferred in reference to actions and other proceedings; and they also took on lease land and other heritable subjects for the purposes of the business, and granted leases of heritable property belonging to the company. They also contracted loans and bought and sold land and other property for the purposes of the business. In terms of article 8, Jardine, Skinner & Co. used the firm's name of "Robert Watson & Co." in dealings and transactions and suits which could be conducted in the firm's name.

(7.) A power of attorney was executed by each individual partner in favour of Jardine, Skinner & Co. to carry on the business on his behalf in all its departments. No such or similar power was granted to Matheson & Co.

(8.) In virtue of article 14, all necessary books of account of the partnership, shewing the receipts and payments and assets and liabilities, were kept by Jardine, Skinner & Co., as the managing agents in India, at their usual place of business in Calcutta. . . . These business books were separate from the ordinary business books of Jardine, Skinner & Co.

(10.) The produce of the partnership estates was either realized by Jardine, Skinner & Co., and the proceeds remitted to the London agents, or it was consigned to the London agents for realization in Europe, all in terms of article 19. In the latter case, Matheson & Co. transmitted to Jardine, Skinner & Co. statements shewing the realization for entry in the business books of the partnership in India. In carrying out the said article 19, Matheson & Co. were, during the whole period of the partnership, under advance to Robert Watson & Co., as the outlay was chiefly at the beginning of each season, and from the nature of the business no season's accounts could be closed until from six to nine months after the next season had begun.

On the 15th of March, 1889, the Lord Ordinary (the late Lord Fraser) found that the concern of Robert Watson & Co. had its head office in London; and, therefore, the late Mr. Laidlay's shares therein were personal estate situated in the United Kingdom, and liable to probate duty.

This decision was adhered to on the 12th of July, 1889, but on different grounds, by the majority of the First Division of the Court of Session (1).

The Lord President (Inglis) and Lords Mure and Adam were of opinion that even if it were taken that the seat and centre of the business was in India, still, by reason of article 25, the true nature of the interest of the deceased partner was to a money payment recoverable or recovered in this country by persons resident and domiciled here, from persons resident here, and therefore liable to probate duty in the United Kingdom.

Lord Shand differed from the majority, and also from the opinion of the Lord Ordinary; and held that the fund was not subject to probate duty in this country. He was of opinion,

(1) 16 Court Sess. Cas. 4th Series (Rettie), 959.

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first, that the business was an Indian business, and therefore the interest in the business was Indian assets, and not English or Scotch; and secondly, that the interest of Mr. Laidlay in this Indian business was the subject of the sale, and accordingly there was nothing here but the deceased's executors realizing his interests in that Indian company, and therefore realizing an asset situated in India. And also, if the company had, under the 25th article, taken over Mr. Laidlay's share, it would be a contract debt probably, but not one in respect of a share or interest in an English company, but of an Indian company; and though the money might for convenience be paid in this country, the right or property in respect of which payment would be made was situated in India.

On appeal.

1890. Aug. 4, 5, 7. *The Dean of Faculty* (*Balfour*, Q.C.), and Sir *Horace Davey*, Q.C., for the appellants:—

The decision of the majority of the judges in the Court of Session was erroneous. This was an Indian firm. The contract of copartnery, and the course of business as proved by the minutes and admissions, characterises India as the locality of the business, and therefore a share in the assets of the business must be Indian assets. The whole property and business of the adventure were in India. The cultivation and the manufacture of the indigo and other produce were in India. The books of account of the company were also kept there—a circumstance which in similar cases has always been regarded as important. The managing agents in India had also power to contract loans and suits, and conduct all other matters and proceedings in the name of the firm. There was in fact not one of the incidents of such a business which was not in India. On the other hand, the partners' powers were reduced to almost nothing. The committee was a mere consultative committee. It had nothing to do with controlling the mercantile part of the business, and the minute-book shewed that the matter upon which their advice was sought was confined to questions whether the costs of a heavy litigation in India should be spread over one or three

years, and as to the closing of a certain silk factory. Nothing could be more unlike the functions of a board of directors. Matheson & Co. were the London financial agents. They were always under heavy advances, and the amount of such advances was reduced after the year's crop was realized. They paid the partners; but they did nothing which a London financial house might not have been called upon to do for an Indian business. Sir James Hannen said, *In re the Goods of Ewing* (1): "The share of a deceased partner in a partnership asset is situate where the business is carried on." And he refers to Hanson on the Probate Acts, &c., p. 161: "Shares in a company are locally situated where the head office is," and *Attorney-General* v. *Higgins* (2). In *Fernandes' Executors* (3), a case just the converse of this, Giffard, L.J., said: "When the charter is looked at it is found to be, to all intents and purposes, an English company." So here, when the articles are looked at, it is found to be an Indian company.

There is no doubt that at the time the contract of 1877 was signed, fourteen out of the sixteen partners were resident in the United Kingdom, and two only in India; but at the date of the prior deed of 1855, the majority of the partners were resident in India. At a later date it was otherwise; probably the partners, growing old, had come home; some to live in England, and some in Scotland. They were sometimes at home and sometimes abroad; so the particular residence of the partners cannot affect the question.

Secondly, the right which belonged to the deceased partner during his life was an aliquot part of all the assets of the firm corresponding to three of the thirty-two parts. The majority of the judges did not dispute this; but they thought an entire change took place when Mr. Laidlay died, and that a right to an aliquot share never descended to his executors, but that their right was a money claim. That view was founded on a misconstruction of the 25th article. That article provides, and it is strong in the appellants' favour, that the interest of such deceased partner or his representatives in the said profits and

(1) 6 P. D., at p. 23. (2) 2 H. & N. 339.
(3) Law Rep. 5 Ch. Ap., at p. 317.

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losses is to go on until the 30th of September next after his death. It provides that the deceased's share of the partnership shall be a continuing share, and then goes on to give the representatives a transferable interest, and not a mere right to an account; that is, that although they were not allowed to assume the status of partners, yet they had sufficient interest to sell and make some one else a partner within a certain time and with the partners' approval. This was not only consistent, but could only be carried out by their having the share of the deceased vested in them. Their right was an extant and existing right at the time it was transferred to the three sons of the deceased. There was no cesser of interest until the 30th of September next after the death, and before that date it was sold to approved purchasers, and the estate the sons took from the deceased, through his executors, was precisely the same estate and interest which he held himself during his life. It was very like the case of a transfer by a deceased partner's representatives under the Companies Act, 1862, s. 24. This case is distinguishable from that in which there is a provision, which is a common one in partnership articles, that upon the death of a partner there shall be a devolution of all interest and assets to the surviving partners upon condition of paying the representatives of a deceased partner a sum of money.

The Solicitor-General for Scotland (*Darling*, Q.C.) (with him the *Lord Advocate* (*J. P. B. Robertson*, Q.C.) and *W. J. Mure* (of the Scotch Bar)):—

The firm of which the deceased was a member was an English partnership, and his share was an asset in the United Kingdom. The partners and the managing agents, Messrs. Jardine Skinner & Co., were different bodies, but both were recognised by the deed as being engaged in the conduct of the partnership. But Messrs. Jardine & Co. were nothing more than agents, in whom the partners had great confidence, and who were entrusted with the fullest powers necessary for carrying on the business in another hemisphere. It is most distinctly provided by the 9th article that a committee of the partners, subject to the approval of the general meeting of partners, shall decide all

matters affecting the interest of the copartnery, and there is an ultimate power in all the partners to interfere and give orders. Therefore, the partners, or the committee of partners, were the masters, and Messrs. Jardine & Co. the servants—and that helps to fix where the situation of the business was. Then the committee of partners and partners habitually met in London, and the mere fact that they, having great confidence in Messrs. Jardine & Co., did not find it necessary to interfere much in the conduct of the business, did not detract from the power inherent in them as principals to control it. It may be admitted that the situation of the business could not differ according to whether the majority of the partners were or were not resident in any particular jurisdiction, but taken in connection with the facts that the meetings of the partners were in London, &c., that the whole proceeds were to be remitted to London, and that the profits were to be divided there, it was a strong indication that the seat of the business was in London. Again, the partners intended to be under English law, it being an English deed, and containing a reference in case of any dispute to English arbitrators.

Then as to the nature of the interest of the deceased in the business. It is not a right to a specific portion of the assets; it is a right of a personal nature—a right to call upon his partners to account. In Lindley on Partnership (5th ed. p. 339), it is said, "What is meant by the *share* of a partner, is his proportion of the partnership assets after they have been all realized and converted into money, and all the debts and liabilities have been paid and discharged." And at p. 343: "From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that, in equity, a share in a partnership, whether its property consist of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties." See also p. 347 as to the doctrine of conversion, and Bowen, L.J., in *Attorney-General* v. *Hubbuck*. (1)

(1) 13 Q. B. D., at p. 289.

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It is of little consequence to inquire where the local situation of the business is, for the interest the deceased had in the partnership, during his life and up to the moment of his death, was a right in the first place to a share in the profits, and in the second a right to proceed against his co-partners to account in money for his share of the partnership assets, and that right he would enforce in London, where the trustees were.

Then as to the construction of article 25 of the partnership deed. The share, which is the asset in question, passed to the executors not by the will of the deceased, but by force of the contract of copartnery, in such a form that they could only realize it in the shape of money.

If the assets are recoverable in England, that is sufficient to make them liable to probate duty here: *Attorney-General* v. *Bouwens* (1) decided that, although, what the testator, dying in this country, had from a foreign government could be recovered from the foreign government in a foreign court, still, inasmuch as the price was recovered here by transfer of the bonds, the executors so recovering the money must be held to recover it virtute officii, and so must pay probate duty.

In *Attorney-General* v. *Pratt* (2), bills of exchange, drawn by a bank in India on a bank in England, the property of the testator, who died in India, which were on the high seas on their way to England at the time of his death, were held to be subject to probate duty here, on the ground that the executors had in fact recovered in this country the proceeds of the bills where the debtors the acceptors resided.

The executors here did not step into the testator's shoes; they could not enjoy the shares; they could only either recover the money from the partners or sell with the approval of the committee.

[He also cited Lord Campbell, in *Attorney-General* v. *Brunning* (3)].

LORD HERSCHELL:—

My Lords, in the year 1877 a partnership was constituted for the purpose of carrying on a business, which is thus described in

(1) 4 M. & W. 171, at p. 192. (2) Law Rep. 9 Ex. 140.
(3) 8 H. L. C. 243, at p. 256.

the second article of the deed of partnership: "The business shall be the carrying on and working of indigo and silk concerns and zemindaries for the production or manufacture or working of indigo and silk and other produce, and for the sale in Calcutta or shipment for realization in Europe of such produce."

One of the partners in this firm, Mr. Laidlay, has died, and the question has arisen whether his interest, whatever it may have been, derived from the deed of partnership to which I have called attention, is an asset situate in England, and therefore made the subject of probate duty in respect of which probate must be taken out in this country. There can be no doubt that the question to be determined is, what is the local situation of the asset with which we have to deal, because that the testator's interest in the partnership, however it is to be described, was one of his assets is beyond dispute.

My Lords, it has been said that the point to be determined is,—what is to be regarded as the locality in which the partnership is situate? I think it would be more accurate to state the question thus: What is to be regarded as the locality in which the business which is the property of the partnership is situate? Probate duty attaches to bona notabilia in the place where the goods are situate, wholly irrespective of the question of the domicil of the testator; and in the case of *Ewing* (1), Sir James Hannen, in speaking of the share of a deceased partner, stated that in his view it was situate where the business was carried on. Well, my Lords, in the present case we have to consider what is the locality in which the business which was the property of this partnership was situate. The choice has to be made between England and India. It has not been disputed by the learned counsel for the respondent that its locality cannot be both England and India—the choice has to be made between the two. Undoubtedly there are considerations arising from the terms of the partnership deed and the circumstances surrounding it, some of which point in the one direction and some in the other. Your Lordships have to consider which of these preponderate, and what is the choice to be made.

In support of the view that the business which is the pro-

(1) 6 P. D. at p. 23.

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perty of the partnership is to be regarded as situate in India, there appear to be these very cogent considerations. The business carried on was the cultivation of estates, all of which were situate in India, and the selling of the produce of these estates. The business properly so-called was entirely carried on there. Nothing had to be done outside India except obtaining financial assistance from a firm in England and selling the produce which was not disposed of in India either in England or elsewhere. The business was conducted by managing agents, who could not be dismissed so long as they held the requisite shares in the partnership, and these managing agents were an Indian firm residing and carrying on business in Calcutta. They alone used the name of the firm with which we are dealing. The partners in this firm, which traded under the style of Robert Watson & Co., were not at liberty to use that name—neither the individuals nor the whole of them. Messrs. Jardine, Skinner & Co., the managing agents to whom I have referred, were to transact and carry on the entire business, to make all the necessary contracts, to appoint and discharge the persons employed, to draw in their own names for the necessary funds, and to allocate the profits to the several partners in the partnership books; and the whole of these partnership books were to be kept in Calcutta.

My Lords, a stronger case—if the matter stood there, a more absolutely conclusive case—of a business locally situate in India it is hardly possible to conceive; and if there were nothing else to be found in the deed I do not see how even a doubt could have been entertained that India was to be regarded as the locality in which the business belonging to this partnership was situate.

I turn now to the points relied upon as shewing that the locality ought to be regarded as England and not India, only saying at the outset that, having regard to the facts to which I have drawn attention, some very strong and overwhelming considerations would have to be suggested in order to get rid of the case which indicates India as the seat of the business.

Now the circumstances relied on are these: in the first place the residence of the partners. There were sixteen partners, who, according to their description in the deed which constituted the

partnership, were at that time residing, seven of them in England, seven in Scotland, and two in India. I do not see how any inference is to be drawn from the place of residence. That would indicate, if numbers are to be relied upon, as much a Scotch business, a business to be regarded as situate in Scotland, as a business to be regarded as situate in England; and although the importance of that distinction is not now what it was, owing to comparatively recent legislation, yet of course the questions relating to probate in Scotland and England respectively were as distinctly and as sharply severed as in respect of England or Scotland on the one hand and India on the other. It seems to me that, from the fact that some of the partners resided in England and some in India, it is impossible to draw any inference which would at all diminish the weight of the circumstances upon which I have commented as indicating India as the locality where this business is situate.

Then it is said that the partners, residing as many of them did in England and in Scotland, had vested in them a control of this business, although Jardine, Skinner & Co. were the persons who were to carry it on That depends upon the construction especially of the 9th, 11th, and 21st articles of the partnership deed. A committee was created who were to advise with the agents of the partnership "on all matters affecting the interest of the partnership," and who were also, subject to the approval of a general meeting of the partners, to decide on all matters affecting the interest of the partnership. The 11th clause empowered Jardine, Skinner & Co. to decide whether all the branches of the business should be carried on, or which of them and to what extent; but this was made in terms subject to the opinion of the committee. The managing agents were also empowered to determine what new branches of business should be undertaken; but there again no new branch was to be undertaken without the consent of the committee. The 11th clause then proceeds to give the fullest powers to Messrs. Jardine, Skinner & Co. with regard to the conduct of the business, and in the terms in which those powers are conferred there is no such proviso as is inserted in the earlier part of the clause relating to the consent of the committee being requisite. The necessity for

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that consent or approval is limited to two things only, as it seems to me, the discontinuance or diminution of the business theretofore carried on, or the addition to or increase of it by opening up new branches.

Then, turning to the 21st clause, no partner or partners were to contract any debt or draw or accept or indorse any bill in the name of the partnership, nor were any of the partners, not being a majority, to interfere in any way with the conduct of the business by Jardine, Skinner & Co. or Matheson & Co. (whose connection with the business I will come to in a moment), but all powers for controlling, regulating, ordering, and managing the affairs of the partnership, which consistently with the provisions of these presents might be exercised by all the partners for the time being, might be exercised by a majority of them Now that clearly indicates that there was intended by the deed to be a limitation of the extent to which the partners, even the whole of them, could control, regulate, order, or manage the affairs of the partnership, because it is only so far as consistent with the provisions of the deed that those powers possessed by the whole might be exercised by the majority. And, my Lords, when the whole of this deed is looked at I cannot doubt that although it was intended that Messrs. Jardine, Skinner & Co. should defer to the wishes of the partners, and that the partners should decide upon matters which might be suggested affecting the interests of the partnership, yet that the management of the business proper was to be vested in Jardine, Skinner & Co., and not in the partners generally.

But, my Lords, even if it were the case that these partners, residing some in England, some in Scotland, and some in India, could have controlled as they pleased the action of Jardine, Skinner & Co., to my mind that would not in the slightest degree diminish the importance of the facts to which I have called attention as shewing that the seat of this business was India. I cannot recognise the view as sound that the fact that an individual (to put a simple case for the moment) who, owning a business carried on in India, resides out of India, resides, it may be, from time to time in different countries, and can from any of those countries control the action of the agents who are carrying

on his business for him, transfers the locality of that business from time to time to the particular country in which he happens to reside, and from which his orders to his agents would emanate. And, therefore, for my part I do not consider it necessary to enter into any minute criticism as to the relations of these partners to Jardine, Skinner & Co.—that is to say, to what extent they could control or regulate the action of that firm, because it seems to me that, whatever that extent was, having regard to the terms of the deed, the fact that that power of control existed did not in any way prevent this business, carried on as it was and intended to be carried on as it was, from being a business situate in India.

Then the respondent relies upon the fact that Messrs. Matheson & Co. were the London agents of the partnership; they had London agents, he says, just as they had Calcutta agents, and the Calcutta agency no more points to its being an Indian business than the London agency points to its being an English business. But, my Lords, the functions of the London agents were of a totally different character from those of Messrs. Jardine, Skinner & Co., to which I have already alluded. The London agents were a financial house who afforded the necessary financial assistance to the business in India. Having advanced the funds required for the cultivation, they stipulated that the proceeds of the produce when realized should be remitted to them in London, or that if it was determined to realize the produce by sale in England or Europe rather than in India, they (Matheson & Co.) should be the agents to whom the produce should be so consigned for sale. Except that the produce was thus remitted and that Matheson & Co. were thus constituted agents, they had no connection with the business, and no right to interfere in its management.

My Lords, I cannot bring myself to think that the fact that a financial firm in this country were constituted agents, for these purposes and to this extent, of a firm whose business was carried on substantially in India at all alters the character of that firm or its business, and makes it in any respect other than an Indian business.

In connection with the deed of partnership, one other circum-

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stance only was, I think, relied upon, and that is, that by the deed Messrs. Matheson & Co. were constituted, in case any difference arose, the arbitrators to determine it between the partners. But it was hardly seriously contended that this fact of itself was of any weight, or made what was undoubtedly an undertaking carried on out of this country an undertaking carried on within it.

My Lords, giving the fullest weight to all the arguments based upon the transactions which were to take place in this country and the residence of partners here, it appears to me impossible to hold that they in any way countervail or get rid of the considerations with which I started, and which point to this being an Indian business, and, therefore, a business the partnership property of which is locally situate in India. In saying this I am differing from the view taken by the Lord Ordinary; but, on the other hand, I am agreeing with the view which was taken by Lord Shand in the Court of Session, and which was not dissented from by the majority of the Court, who based their judgment upon an entirely different ground, to which I now pass.

The point which now arises starts with the hypothesis that this was a business locally situate in India, and that the asset consisted of a share in a business which was locally situate there. My Lords, reliance is placed upon the 25th clause of the partnership deed, as shewing that, even if apart from that provision this is to be regarded as a business situate in India, nevertheless there was an asset of the testator locally situate in this country which was properly the subject of probate here. My Lords, the clause relied on provides that on the death of any partner his representative should not become a partner in respect of any share of his, but that the interest of the deceased partner should cease from the 30th of September next after his decease. Therefore, the interest of Mr. Laidlay in this firm unquestionably vested in his executors and remained in them from the time of his decease down to the time when it was disposed of by a subsequent transaction.

The clause then goes on to provide that if the trustees desire to sell the share, and can find a purchaser whom the committee

approve of, then they may complete that sale and pass to the purchaser from them the share and interest in the partnership and all its assets which was possessed by the deceased partner. If they are unable to find any purchaser of whom the committee approve within six months, or if they do not desire to sell in the manner provided for, then at the end of the six months the fair value of the share of the deceased partner as on the 30th of September on which his interest is to cease falls to be determined by Messrs. Matheson & Co., and upon the executors executing a transfer or assignment of the share the trustees of the partnership are to pay to the representatives of the deceased partner the sum so fixed by Messrs. Matheson & Co.; and there is a provision for charging it and paying it by instalments upon which I need not dwell. And the 26th clause provides that "every purchaser becoming entitled by purchase or obtaining such transfer of the share of a deceased partner, and executing such mortgage or indemnity, shall upon entering into a covenant with the trustees of the partnership to perform and abide by all the provisions herein contained become a partner in the place of the deceased partner."

Now, my Lords, I think that when that provision is considered, it renders it clear that this asset, which, by the hypothesis, was a share in a partnership business situate in India, did not by the exercise by the representatives of the deceased partner of this option, however they exercised it, convert that which otherwise would have been an Indian asset into an English asset. It is said that the representatives of the deceased partner sold to persons in this country; but that transaction of sale was a transaction altogether subsequent to the death, and the character of the asset and its local situation cannot be affected by circumstances arising out of a transaction subsequent to the death. The question is, where was the asset situate at the time of the death? That it was sold to a person residing in this country, and that therefore the payment in respect of it became a debt from a person residing in this country, and that in the case of a debt the locality of the debtor is to be regarded as the locality of the asset, can matter nothing, because this was not a debt existing at the time of the death of the testator, but arose

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subsequently to his death by a sale of a part of his assets, and of course the local situation of his assets cannot be in the slightest degree affected by what arises out of a sale of those assets.

My Lords, with the utmost respect for the learned judges in the Court below who took this view, I am unable really to entertain any doubt whatever upon this point. It appears to me clear that there has been some confusion between the rights which have arisen out of the sale of an asset of the testator and the question, what was the character of that asset, and where was it situate before it was sold, which is really the question falling to be determined.

My Lords, for these reasons I think that this asset was a share in partnership property consisting of a business and property locally situated in India, and that the share, therefore, must equally be regarded as an asset situated in India, and that no subsequent dealing with that share under the powers conferred upon the representatives of the deceased partner by the deed of partnership can alter that local situation, or make that which was an Indian asset other than an Indian asset.

For these reasons I move your Lordships that the interlocutors appealed from be reversed, and that the cause be remitted to the Court of Session, with directions to assoilzie the defenders and declare them entitled to the expenses in the Court below, and that the respondent do pay to the appellants the costs of this appeal.

LORD WATSON:—

My Lords, I entertain the same opinion which has been expressed by the noble and learned Lord on the woolsack. In consequence of the different grounds of judgment selected by the Lord Ordinary and by the First Division of the Court, both of whom gave judgment for the claim of the Crown, it is necessary in this case to consider two questions, viz.: First, what is the nature of the asset in respect of which probate duty is sought; is it a claim for a sum of money, or is it a share in the business of Robert Watson & Co.? And, secondly, if the latter, what was the seat of the business of which it is a share?

The judgment of the Inner House, with which I am unable to agree, appears to me to rest upon a confusion between two

things essentially distinct, that is to say, the intrinsic nature of the asset which fell in bonis of the late Mr. Laidlay upon his decease, and the powers which are given to his executors to deal with that asset. Their Lordships have assumed that, immediately upon the death of Mr. Laidlay the asset in question, had, before the trustees applied for confirmation, become nothing more than a right to a sum of money payable in England. Now, upon construing the contract, I think it is quite impossible to arrive at that conclusion. No doubt the right of the executors to uplift the profits of his share was terminable,—it might come to an end on the very day of Mr. Laidlay's death, and so might never come into existence. But the share did not cease to bear profits, and when sold or taken over carried the profits intermediately accruing to the purchaser from the executors. That which the executors had in bonis was a share to sell, and they had the right to sell, and in point of fact did sell and transfer. The consequence has been that their transferees are now in as full right of the deceased's share as he was himself during his lifetime, not against the contract or inconsistently with the contract, but in entire accordance with its provisions.

My Lords, I do not think the result would have been different if those executors whose choice of a purchaser was very circumscribed, because they could sell to no one without the approval of the committee of partners, had failed to find a purchaser to the satisfaction of the committee. In that case the contract provides that the share shall be valued by the London agents, Matheson & Co., and upon payment of the valuation the share is to pass to the partners or to any third person whom they may choose to appoint to take the share. But even in that event the contract recognises that the asset which the partners or their appointee acquire by that transaction from the estate of the deceased is a share belonging to the executors; and accordingly express provision is made in the 25th article of the contract for the executors granting a transfer of the share as a condition of their right to receive the amount fixed as its value by Messrs. Matheson & Co.

With respect to the second question, as to the seat of the business, I have listened with much pleasure to the very plausible arguments which have been addressed to the house on behalf

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of the Crown by the Solicitor-General for Scotland. I say "plausible" because it appeared to me that there never was a plainer case for fixing the locus of the business abroad. I am not going to follow the noble and learned Lord who preceded me into the details of the case; but there are one or two matters which appear to me to be absolutely conclusive upon the point. The whole of the assets are in India, so are all the officials and servants of the firm. The agents in India, who must include in their firm at least one partner of the concern holding a certain amount of its shares, have the absolute right of management—absolute as to finance, absolute as to the mode of cultivation, absolute as to the mode of realizing assets—and they are charged, moreover (and that appears to me to be a very important feature in the case) with keeping the books, with making up the balance-sheets—with everything, in short, that is necessary to the conduct of the business down to the ascertainment of profits, and the apportionment of those profits amongst the partners. It is a very singular contract—singular in this sense, that contracts in these terms are not frequently met with before courts of justice. These partners seem to have renounced the power to do almost every act which usually distinguishes a partner. They cannot sign their own firm name, they cannot effectively interfere in the conduct of the business. Their function seems to be limited principally, if not wholly, to two matters: the first is, to determine whether the limits of the business shall be expanded or contracted, because upon that point they are to judge, whereas the moment the limits are fixed, then, so far as regards conduct and management, the managing agents in India have the sole power. The second matter is the important privilege of taking their profits when they have been apportioned and handed over to their agents in London. In this case it can hardly be said that the partners had any office or place of business; but even if they had that fact would not, in my opinion, be sufficient to qualify the circumstances to which I have already referred as leading to the inference that the place where this business was carried on, and the only place which can be predicated as the locus of the asset, is India.

For these reasons I concur in the judgment which has been proposed.

LORD MACNAGHTEN:—

My Lords, I must say that I think this is a very plain case. It cannot be disputed that the business which Messrs. Jardine, Skinner & Co. of Calcutta carried on under the style or firm of Robert Watson & Co. for and on behalf of the persons named in the deed of 1877 as partners in that firm was an Indian and not an English business. India was the field of its operations. The whole of its capital, consisting both of moveable and immoveable property, was in India, and the books of the business which recorded all the transactions done in the name of the firm and the particulars of the interests of the individual partners were kept in Calcutta. The business was, I think, as purely an Indian business as any business can be which is carried on in India on behalf of persons some or all of whom may be resident outside the territorial limits of India.

Now it cannot, I think, be disputed, that if the whole business had belonged to one person, and that person had resided in England, and had died here, an Indian and not an English probate would have been required in order to enable his legal personal representatives to collect the assets of the business.

It was contended, however, that the fact that the business was carried on for and on behalf of a body of persons, all but two resident in the United Kingdom, associated together in partnership and not on behalf of an individual, makes a difference. I am at a loss to see what difference that fact of itself, and apart from any special contract to be found in the deed of co-partnership, can make. If the business in its entirety is situated in India I cannot understand how it can be that the several shares which make up the whole are situated somewhere else.

Then comes the question, is there anything in the deed of partnership tending to shew that the share of a partner dying during the co-partnership is to be considered as situated in any other place than that in which the business is carried on? Quite the contrary. The death of a partner does not cause a dissolution of the partnership as between the other partners, or any change of any sort or kind in the business. The business goes on as it did before. The whole capital vested in the trustees still remains in India. The share of the deceased

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partner does not cease to exist on his death. Up to the end of the current financial year the deceased partner has an interest in the profits and losses of the partnership. After that date the interest of the deceased partner in the share which belonged to him is in abeyance; but it belongs to his legal personal representatives, and to no one else. They and no one else can sell and transfer it; and when they sell it they sell it with all the profits belonging to it which have accrued in the meantime. Now that share is a share in an Indian business, and the locality of that asset, in my opinion, is India, and not England.

In my opinion an Indian and not an English probate was required to enable Mr. Laidlay's legal personal representatives to recover Mr. Laidlay's share of current profits, and to transfer his share in the partnership business to a purchaser.

I think, therefore, that the interlocutors appealed against must be reversed.

LORD MORRIS concurred.

Ordered and Adjudged, *that the interlocutors of the 15th of March and 12th July*, 1889, *appealed from be reversed: And that the cause be remitted back to the First Division of the Court of Session in Scotland, with directions to assoilzie the defenders (appellants), from the conclusions of the summons, and to find them entitled to their expenses in the Court of Session: and further* Ordered, *that the respondent do pay the appellants the costs incurred in respect to this appeal.*

Lords' Journals, 7th August, 1890.

Agent for the appellants: *Andrew Beveridge, for W. M. Morris, S.S.C. Edinburgh.*

Agent for the respondent: *Sir W. H. Melvill, Solicitor for England for the Board of Inland Revenue, for David Crole, Solicitor for Scotland for the Board of Inland Revenue, Edinburgh.*

[HOUSE OF LORDS.]

WILLIAM BLAIR (PAUPER) . . . . . APPELLANT;

AND

THE NORTH BRITISH AND MERCANTILE INSURANCE COMPANY AND ANOTHER . . . . . RESPONDENTS.

H. L (Sc.)
1890
Aug 7

Bankruptcy—Sequestration—Oath of Creditor, Verity of—Appeals in formâ pauperis—Bankruptcy (Scotland) Act, 1856 (19 & 20 *Vict. c.* 79), *ss.* 9, 15, 22.

APPEAL from an unanimous judgment of the First Division of the Court of Session, Scotland, adhering to the decision of the Lord Ordinary, Lord Kyllachy.

The object of the appeal was to have the appellant's sequestration recalled on various grounds, which this House held were untenable, and which are fully reported in the Court of Session (1).

Aug. 7. *Alexander Robertson* and *Geo. Leslie Bannerman* (2) appeared for the appellant.

The Lord Advocate (*J. P. B. Robertson*, Q.C.), and *Maconochie* (of the Scotch Bar), for the respondents, not heard.

THE HOUSE (Lord Halsbury, L.C., and Lords Watson, Herschell, Macnaghten, and Morris), considered the appeal groundless, and affirmed the judgments appealed from.

Their Lordships were all of opinion that some means ought to be devised to put a stop to cases being brought in formâ pauperis on appeal to this House for which there was not the slightest shadow of foundation.

Lords' Journals, 7th August, 1890.

Agents for the respondents: *Grahames, Currey, & Spens, for J. & F. Anderson, W.S., Edinburgh.*

(1) 16 Court Sess. Cas. 4th Series (Rettie), 947.

(2) These were not the counsel who signed the petition of appeal.

[HOUSE OF LORDS.]

H. L. (E.) 1890 Aug. 7.

VICKERS, SONS & CO. LIMITED . . . . APPELLANTS;

AND

GEORGE SIDDELL . . . . . RESPONDENT.

Patent—Provisional Specification—Complete Specification—"Distinct Statement of the Invention claimed"—Patents, Designs, and Trade Marks Act 1883 (46 & 47 *Vict. c.* 57) *s.* 5 *sub-s.* 3, 5, *s.* 26 *sub-s.* 3.

The enactment in sect. 5 sub-sect. 5 of the Patents, Designs, and Trade Marks Act 1883 that a complete specification must end with a distinct statement of the invention claimed is directory only, and non-compliance with it does not invalidate a patent.

The decision of the Court of Appeal (39 Ch. D. 92) affirmed.

By LORD HALSBURY L.C.:—It is an essential condition of a good patent that the invention described in the provisional should be the same as that in the complete specification, and non-compliance with this condition is by sect. 26 sub-sect. 3 of the Act preserved as a ground upon which the infringement of a patent right may be defended and a patent may be revoked.

APPEAL from an order of the Court of Appeal (1).

The action was brought by the respondent against the appellants to restrain the infringement of a patent. The defendants disputed the validity of the patent on several grounds, of which two only are material to this report, viz., first, that the complete specification did not end with a distinct statement of the invention claimed as required by sect. 5 sub-sect. 5 of the Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57); secondly, that the provisional specification did not describe the nature of the invention, and that the invention described in the complete specification was different from and larger than that described in the provisional.

The patent was for an improved mechanical appliance for working or operating on large forgings in iron or steel.

The provisional specification (omitting formal parts) was as follows:—

"This invention relates to the construction and application of

(1) 39 Ch. D. 92.

an improved and more simple and effective mechanical appliance or means for working or operating on large forgings in iron or steel, being such forgings as are usually made under a hydraulic forging press or machine.

"My improved appliance consists of a horizontal bar or bars made of suitable metal and fitted with suitable pulleys and hooks, which bar or bars can be placed or fitted on either side of the crosshead of the forging press, or through the 'pellet' or key-way.

"Clips or grips or ratchets are conveniently arranged so as to fix on or hold the ingot or forging and hooked on the ratchet or clip or grip; and in operating, when the press lifts up or is raised, the ingot or forging will be turned as much as required at every stroke or operation of the press.

"The crank-bar of the press in connection with the wheel and endless chain thereof will raise the forging from the anvil at the same time that the clip or grip or the ratchet is turning the forging, the ratchet being suitably fixed for turning the crane-wheel over which the endless chain passes.

"The ratchet has a chain attached to the crane girder which will travel along a horizontal bar suitably fixed for the purpose and will turn over the ingot or forging in the furnace."

In the complete specification the plaintiff said:—

"This invention relates to the construction, adaptation and application of an improved, more simple and effective mechanical appliance or means for working or operating on large forgings in iron or steel, which forgings are such as are usually made under a hydraulic forging press or machine or a steam hammer; and in order that the carrying out of my invention in practice may be fully understood, I have illustrated it on the accompanying two sheets of explanatory drawings, and have marked the same with letters of reference corresponding with those in the following description thereof."

Then followed a detailed description with references to drawings, and the specification concluded thus:—

"Having now particularly described and ascertained the nature of my said invention, and in what manner the same is to be and can be performed, I here declare that I do not limit myself to

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the precise details of my invention as hereinbefore specified and as illustrated on the accompanying drawings, because equivalent modifications or variations can be made in such details, and quite consistent with the principles or characteristic features of my invention; and in conclusion I declare that what I claim is—

"The general construction, adaptation or application, and the combination and use of the several parts, in the whole, constituting improved, more simple and efficient appliances or means for working or operating on iron or steel forgings, substantially as hereinbefore set forth and as illustrated on the accompanying drawings."

The action was tried before Kekewich, J., who granted an injunction restraining the defendants from using the plaintiff's invention, with an account of profits and other usual relief. This judgment was affirmed by the Court of Appeal (Cotton, Fry, and Lopes, L.JJ.), with a variation not material to this report. (1) Against these decisions the defendants appealed.

Sect. 5 sub-sect. 3 of the Patents, Designs, and Trade Marks Act 1883 enacts as follows:—

"A provisional specification must describe the nature of the invention, and be accompanied by drawings, if required."

Sub-sect. 5: "A specification, whether provisional or complete, must commence with the title, and in the case of a complete specification must end with a distinct statement of the invention claimed."

May 9, 12, 13, 16; June 9, 10, 12, 13. *J. F. Moulton* Q.C. and *W. E. Bousfield* (*A. J. Ashton*, with them), for the appellants, contended, first, that the complete specification went beyond the provisional, and described an invention larger than and different from the invention described in the provisional; that the provisional specification did not comply with the requirements of sect. 5 sub-sect. 3 of the Act, which says that it "must describe the nature of the invention"; that it was not a matter upon which the report of the examiner and the decision of the comptroller were final; that the patent was on that ground invalid, and referred to sects. 6, 7, 8, 9, and 26, sub-sect. 3 of the Act,

(1) 39 Ch. D. 92.

and cited *United Telephone Co.* v. *Harrison* (1) and *Bailey* v. *Roberton* (2). Secondly, they contended that the complete specification did not "end with a distinct statement of the invention claimed," as required by sect. 5 sub-sect. 3 of the Act; that the words of that section were imperative, not directory; that the patent was therefore bad, and referred to Form C in the schedule to the Act. They also argued that the patent was bad on the ground of want of novelty and that there was no invention.

Sir *R. Webster* A.G. and *Aston* Q.C. (*W. N. Lawson*, with them) for the respondent.

Moulton Q.C. in reply.

The House took time for consideration.

Aug. 7. LORD HALSBURY L.C.:—

My Lords, the questions of law, as distinguished from those of fact, which have been suggested in the argument of this case, have an importance beyond the decision on the rights of the parties to this litigation; and the first is, the question of the remedy, if the provisional specification does not describe the same invention as the complete specification.

It is suggested that the new machinery of the comptroller and the examiner has superseded the power of raising any objection to the conformity of the provisional and the complete specification. I am unable myself to take that view. I think it is an essential condition of a good patent that the invention described in the provisional should be the same as that in the complete specification, and I think the 3rd sub-section of sect. 26 preserves this as a ground upon which an action for the infringement of a patent right may be defended, and a ground upon which a patent may be revoked. But, upon the comparison of the two in this case, I am satisfied that what the patentee meant in one he meant in the other. To my mind, it is impossible to doubt that the real invention contemplated by both was the same thing, and, obscurely as they are both framed, I think the objection fails.

(1) 21 Ch. D. 720. (2) 3 App. Cas. 1055.

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The objection that no distinct claim is made, is one of form only, and I think the legislature did not intend to make the direction, which undoubtedly the Act contains, a condition upon the non-compliance with which the patent should be void. There is no trace of any such intention in the statute, and there does not seem any good reason why it should be inferred from the general policy of the statute. On the contrary, the questions of mere form, I think, were intended to be dealt with under the new machinery provided.

Upon the facts of the case, I confess I have been unable to entertain any doubt. The problem to be solved by the inventor (and which it appears to me the inventor in this case has successfully solved) was how to turn large forgings. He has invented a simple, useful, and easily manageable apparatus for accomplishing this object. It may be quite true that everyone knew the use of an endless chain and of a ratchet before; but it is clear to my mind that, in the first instance, everybody acquainted with the subject thought that the patentee's was a new invention, and, however old the elements of the apparatus, the combination was new. One cannot but see that the first objection raised by his former employers, though abandoned at your Lordships' Bar, namely, the contention that they had themselves invented it, is the strongest possible proof of what they thought about it, and they certainly were persons likely to know and appreciate whether the apparatus was new. Later on they agreed to assist the patentee in getting his patent if he would consent to their using it without paying him for the use of it. And, looking at the practical knowledge possessed by these gentlemen, I regard their conduct in this matter as being quite as important to the case of the patentee as the evidence of Dr. Hopkinson himself.

Neither the Creuzot nor the Abouchoff arrangement seems to me to touch the real point in this case, and though the obscurity which I have referred to before in the language of the specification brings it dangerously near Whitworth's patent of 1875, on the whole I am satisfied that no real anticipation of the patent has been proved, and I therefore move your Lordships that this appeal be dismissed.

LORD HERSCHELL:—

My Lords, this is an action brought by the respondent against the appellants in respect of the infringement of a patent, dated the 20th of May 1885, for an alleged invention of an "improved mechanical appliance for working or operating on large forgings in iron or steel." The defendants did not deny that they had infringed the patent, but impeached its validity on the usual grounds, viz., that the alleged invention was not new, and that it was not a fit subject-matter for a patent. They further alleged that it had been improperly obtained from them by the plaintiff, who was in their employ, and that he was not in truth the inventor. This latter point, although strenuously insisted upon at the trial, was abandoned on the appeal to your Lordships' House, the appellants submitting to that extent to the judgment against them.

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The objections of want of novelty and subject-matter cover to some extent the same ground; but it will be expedient to deal with them as far as possible separately. The invention, so far as we are concerned with it in this part of the case, consists of an apparatus for turning heavy forgings, composed of a wheel and endless chain, the wheel being internally toothed, and having a ratchet working in it, by means of which the wheel is caused to rotate, and the forging, which rests in the endless chain, is thus turned from time to time to the extent desired. It is admitted by the respondent that the elements which form this combination are all old. On the other hand, the appellants admit that the combination was never in use prior to the date of the patent. But they allege that, to combine these well-known elements into the apparatus claimed needed no invention, and that it is, therefore, not proper subject-matter for a patent. Forgings, they say, had long rested in an endless chain, the idea of turning such forgings by turning the wheel over which the chain passed was not a new one, and a ratchet working in teeth was a well-known device for causing a wheel to rotate to the desired extent. All this, I think, cannot be denied. But the result is an apparatus of an extremely simple character, which possesses the advantage of being easily moved from place to place, and applied wherever wanted. And the question remains, whether this mode of dealing

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with forgings which require to be gradually turned was so obvious that it would at once occur to anyone acquainted with the subject, and desirous of accomplishing the end, or whether it required some invention to devise it. There is no doubt about the law applicable to such a question, though it is often difficult to apply it to the circumstances of a particular case, and its application is perhaps most difficult when the alleged invention consists of a new apparatus combining known elements. If the apparatus be valuable by reason of its simplicity, there is a danger of being misled by that very simplicity into the belief that no invention was needed to produce it. But experience has shewn that not a few inventions, some of which have revolutionized the industries of this country, have been of so simple a character that, when once they were made known, it was difficult to understand how the idea had been so long in presenting itself, or not to believe that they must have been obvious to everyone.

In considering how the question your Lordships have to answer ought to be determined, I think it is important to see what steps had previously been taken to accomplish the same result as is attained by the alleged invention. Down to a comparatively recent period it had been the practice to turn the forgings by handspikes—a process which not only involved much manual labour, but was a source of some danger to those employed. To get rid of these evils two devices had been adopted, which were called in the argument the "Abouchoff" and the "Creuzot." In the former of these the forging was turned by a hook, suspended by a bar and chain, being fixed in one of the links of the endless chain in which the forging rested, so that, the link being held fast, the forging as it descended was rolled round. The objections to this device are pointed out in the evidence of Dr. Hopkinson, and I think are substantial. Mr. Anderson, who made the crane for the Abouchoff works, and who was experienced in such matters, was called as a witness for the defendants. It appeared on his cross-examination that he had written to the plaintiff's solicitors in these terms: "Mr. Siddell's arrangement seems different in every way, except that the lowering of the forging supplies the power necessary to rotate it. I will give evidence if needed, though I would rather not." The opinion

thus expressed, and the fact that the plaintiff's apparatus, which I am satisfied is more advantageous than that employed at the Abouchoff works, was not adopted there, appear to me to afford some evidence that it was not so obvious as is suggested by the appellants. The Creuzot apparatus, which was free, no doubt, from the objections urged against the Abouchoff, was of a more elaborate character than the plaintiff's, and could not be so readily moved and applied at the different parts of the works. Beyond these two no other plan appears to have been successfully adopted; and it strikes me as very important that the defendants, who were erecting new machinery, and who, of course, knew that some means must be applied for turning the forgings, used for a time, in spite of its disadvantages, the old method of handspikes, and were not at once prepared with any mechanical device to substitute for it, and ultimately, but not until after the plaintiff's invention, made use of the apparatus now in question. I will not dwell upon the various experiments made by the defendants before they took this course. It is suggested that these had their origin in the peculiar position of the defendants' works at the time, though the explanation does not appear to me to be altogether sufficient. It is material, however, to note the manner in which the defendants, who, it must be remembered, were thoroughly conversant with the subject, dealt with the plaintiff's patent in the first instance. They offered to take a licence for a nominal consideration, and to help him to enforce his patent right as between himself and the general public, provided it was done without prejudice to their interests. And they alleged that the apparatus designed by the plaintiff had been improperly obtained from their drawings; but they did not suggest at the outset that it was no invention at all, as the idea was one which would occur at once to any mechanic whose attention was directed to the subject.

After a careful consideration of all the arguments presented by the learned counsel for the appellants, I find myself unable to differ from the conclusion arrived at by the Courts below, that the apparatus of the plaintiff was a new invention and a fit subject-matter for a patent, though I admit that the case is near

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Lord Herschell.

the border line, and that no great exercise of the inventive faculty was required for its production.

I need not elaborate my reasons for thinking that the invention was a new one; they will be obvious from what I have already said in relation to the objection dealt with. It does not appear to me to have been anticipated either by the Abouchöff or Creuzot apparatus. But the patent is said to be open to the charge of want of novelty on another ground. One modification of the plaintiff's invention, though not that infringed by the defendants, with which alone we have hitherto dealt, is said to have been anticipated by Whitworth's patent of 1875. In order to establish this the appellants maintain that the arrangement of the adjustable clip or ratchet grip X shown on Fig. 5 is claimed by itself, and not as part of the combination described in the letterpress in connection with it. They rely, in order to make good this contention, on the statement in the specification that "the appliance as shewn in Figs. 1 and 2 on sheet 1 can also be used in combination; in fact, each arrangement of appliance can be used either separately or combined for the purpose of lifting, slinging, or turning over the ingot or forging when in the furnace, under the press or hammer, or when being otherwise operated on." The specification is certainly not a model of clearness or precision. But I do not think the language has the effect contended for. And I have come to the conclusion that the patent is not bad by reason of any of the modifications of the invention claimed by it having been anticipated by Whitworth's patent.

Two points made on behalf of the appellants remain to be considered. It is said that the complete specification goes beyond the provisional in the invention which it discloses, and that the invention described in the complete is not substantially the same as that which is described in the provisional specification. It is to be observed that under sect. 9 (1) of the Act of 1883 the comptroller is bound to refer both specifications to an examiner, for the purpose of ascertaining whether this is the case, and, if the examiner reports that it is not, the comptroller may refuse to accept the complete specification until it has been amended to his satisfaction. The comptroller must, therefore,

have been satisfied in the present case that the two specifications did substantially describe the same invention. But I will assume (and I am not to be understood as at all indicating a contrary view) that, notwithstanding this, the old objection of want of conformity between the provisional and the complete specification is still open. The provisional specification "must describe the nature of the invention," the complete "must particularly describe and ascertain the nature of the invention, and in what manner it is to be performed." It is obvious therefore that the former may be much more general and less detailed in its terms than the latter. It is enough if the nature of the invention is conveyed by it to the reader. It is alleged by the appellants that the particular apparatus which is in controversy in this action is to be found described in the complete specification only, and that there is no reference to it in the provisional. This latter is most clumsily framed; but I think the scheme of turning the crane wheel over which the endless chain passes by means of a ratchet, and so causing the forging to rotate, does sufficiently appear upon the face of it.

The last objection taken to the patent is, that the complete specification does not "end with a distinct statement of the invention claimed," as required by sect. 5 sub-sect. 5 of the Act. The Act does not provide that if this requirement is not complied with the patent shall be void, and I think it is impossible to imply any such condition. There is no more warrant for doing so in this case than in the case of non-compliance with any other of the provisions of the section. The provision which immediately precedes that in question requires that a specification should "commence with the title." It could hardly be gravely contended that if the comptroller accepted a specification where the title did not occupy the first place the patent granted ought on that account to be held void. I need not detain your Lordships further upon this point, as it was fully dealt with, and to my mind satisfactorily disposed of, by the learned judges in the Court of Appeal. Agreeing as I do with their view of the law, it is not necessary to express any opinion whether the specification did end with a distinct statement of the invention claimed within the meaning of the statute. I should certainly not recommend it as an example to be followed.

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LORD MACNAGHTEN :—

My Lords, I concur.

LORD MORRIS :—

My Lords, I have had the advantage of reading the judgment which has just been delivered by my noble and learned friend Lord Herschell, and I entirely concur in it.

Order appealed from affirmed; appeal dismissed with costs.

Lords' Journals, 7th August 1890.

Solicitors for appellants: *Catterns, Jehu, & Co., for Younge, Wilson, & Co., Sheffield.*

Solicitors for respondent: *J. H. Johnson, Son, & Ellis.*

[HOUSE OF LORDS.]

H. L. (E.) 1890 Aug. 5.

THE REV. JAMES BELL COX (CLERK) . APPELLANT;

AND

JAMES HAKES AND (BY ORDER) THE RIGHT HON. JAMES PLAISTED BARON PENZANCE, OFFICIAL PRINCIPAL OF THE CHANCERY COURT OF YORK . . . . . RESPONDENTS.

Appeal—Jurisdiction of the Court of Appeal—Habeas Corpus—Order discharging Prisoner—"Criminal Cause or Matter"—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *ss.* 19, 47—*Rules of the Supreme Court, Order* LVIII. *r.* 4.

Where a person has been discharged from custody by an order of the High Court under a habeas corpus the Court of Appeal has no jurisdiction to entertain an appeal.

So *held* by Lord Halsbury L.C. and Lords Watson, Bramwell, Herschell, and Macnaghten, Lords Morris and Field dissenting.

A clerk having been sued in an Ecclesiastical Court for offences against the ritual of the Church and pronounced guilty of contempt and contumacy, a writ de contumace capiendo was issued, and he was arrested and imprisoned. A rule nisi for a habeas corpus having been granted the Queen's Bench Division made the rule absolute and the clerk was discharged from custody. The Court of Appeal having reversed the order making the rule absolute :—

Held, that the appeal to the Court of Appeal was not "in a criminal

cause or matter" within s. 47 of the Judicature Act 1873; but that no appeal lay to the Court of Appeal under s. 19 from an order discharging a prisoner under a habeas corpus.

The decision of the Court of Appeal (20 Q. B. D. 1) reversed, and the decision of the Queen's Bench Division (19 Q. B. D. 307) restored on the above ground.

APPEAL from an order of the Court of Appeal reported as *Ex parte Cox* (1). The following are the facts material to the present report:—

The respondent Hakes instituted a suit under the Church Discipline Act 1840 against the appellant, the Rev. J. B. Cox, for offences against the ritual of the Church. The suit was heard before Lord Penzance, Official Principal of the Chancery Court of York. The proceedings in and consequent upon that suit are stated in the report of the decision of the Queen's Bench Division (2). For the present purpose it is enough to say that in the result Mr. Cox having been pronounced guilty of contempt and contumacy, a writ de contumace capiendo issued from the Chancery of Lancashire under 53 Geo. 3, c. 127, commanding the sheriff of Lancashire to attach Mr. Cox "by his body until he shall have made satisfaction for the said contempt." The sheriff having issued a warrant reciting the above writ Mr. Cox was arrested and lodged in the prison at Walton-on-the-Hill in Lancashire.

On the 16th of May 1887 the Queen's Bench Division on an application made on behalf of Mr. Cox granted a rule nisi for a habeas corpus on the ground that the writ de contumace was unlawfully issued. The rule called upon Lord Penzance and the respondent Hakes "to shew cause why a writ of habeas corpus should not issue directed to the gaoler of Her Majesty's prison at Walton-on-the-Hill, in the county of Lancaster, commanding him to have the body of the said James Bell Cox before this Court immediately after the receipt of the said writ, then and there to undergo and receive all and singular such matters and things as the said Court shall then and there consider of and concerning him in this behalf. And why the said James Bell Cox should not be discharged out of the custody of the said

(1) 20 Q. B. D. 1. (2) 19 Q. B. D. 307.

H. L. (E.) 1890 Cox v. Hakes.

gaoler as to his detention by virtue of a writ de contumace capiendo issued from the Chancery of Lancashire without being brought up personally before the said Court."

Lord Penzance and the respondent Hakes having shewn cause the Queen's Bench Division (Lord Coleridge C.J. and A. L. Smith J.) on the 20th of May 1887 made the rule absolute without costs (1), and Mr. Cox was discharged from custody.

The respondent Hakes having appealed the Court of Appeal (Lord Esher M.R., Bowen and Fry L.JJ.) reversed that judgment with costs of the appeal to be paid by Mr. Cox to the respondent Hakes (2).

The report of the arguments is confined to the question whether the Court of Appeal had jurisdiction to entertain an appeal from the order of the Queen's Bench Division discharging the appellant from custody, their Lordships giving no decision upon any of the other questions raised by the case, which were not fully argued. The appeal was first argued before Lord Halsbury L.C. and Lords FitzGerald, Herschell, and Macnaghten.

1889. July 11, 12, 15, 16. Sir *Horace Davey* Q.C. and Sir *Walter Phillimore* (*Hansell* with them) for the appellant:—

The Court of Appeal had no jurisdiction to make the order now appealed from, there being no right of appeal from the order of the Queen's Bench Division. That was an order absolute for a writ of habeas corpus, and was in its nature simply an order of discharge. The Court of Appeal founded their decision on this point upon the jurisdiction given by sect. 19 of the Judicature Act 1873. But that section gives no right of appeal from an order discharging a prisoner under a habeas corpus. The case, perhaps, comes within sect. 47, which says that no appeal shall lie from any judgment of the High Court "in any criminal cause or matter." The proceedings here were a criminal matter. The proceedings on habeas corpus are of a criminal nature; they are not a suit between two persons; the person called upon to shew cause or make a return to the writ is not a party. The present practice in habeas corpus is regulated by the Crown Office Rules 1886, rr. 235–249. The Court or a Judge may make an order nisi,

(1) 19 Q. B. D. 307. (2) 20 Q. B. D. 1.

or if they think proper an order absolute in the first instance, for the writ to issue. In old times the writ was always ex parte. Rules nisi seem to have begun in 1810: see the case of *The Hottentot Venus* (1) in 1810, and *Blake's Case* (2) in 1814, in both of which rules nisi were granted. Corner's Crown Practice, ed. 1804 contains no mention of rules nisi. In habeas corpus the Court has no jurisdiction to give costs to the gaoler or other persons making a return to the writ, even where the Court refuses to discharge the prisoner: *Dodd's Case* (3). In the present case no order was made against the respondent Hakes, not even for costs, and he was not a person aggrieved by the order of the Queen's Bench Division. He could not therefore bring an appeal: the right to invoke the jurisdiction of the Court of Appeal being confined to persons aggrieved. As to what are criminal matters within the meaning of sect. 47 of the Judicature Act 1873, see *Reg.* v. *Steel* (4); *Reg.* v. *Fletcher* (5); *Mellor* v. *Denham* (6); *Reg.* v. *Whitchurch* (7); and *Reg.* v. *Foote* (8). In *Reg.* v. *Weil* (9) the Court of Appeal declined to decide the question whether they could entertain an appeal from the refusal of a Divisional Court to grant a habeas corpus on the application of a person arrested for an extradition crime; but in *Ex parte Woodhall* (10) they held that they had no such jurisdiction, on the ground that the proceedings in respect of which the habeas corpus was applied for were a criminal matter. An ecclesiastical offence is a criminal matter: so is contempt of Court.

[Lord Halsbury L.C. referred to *In re Pollard* (11).]

In *Green* v. *Lord Penzance* (12) and in *Enraght's Case* (13) the Court of Appeal entertained appeals from a refusal to grant a habeas corpus on the application of a person imprisoned for contumacy; but no objection was there taken to the jurisdiction. And perhaps the Court of Appeal has an original jurisdiction, and not by way of appeal, to hear applications for habeas corpus.

(1) 13 East, 195.
(2) 2 M. & S. 428.
(3) 2 D. & J. 510, 525, 532.
(4) 2 Q. B. D. 37.
(5) 2 Q. B. D. 43.
(6) 5 Q. B. D. 467.
(7) 7 Q. B. D. 534.
(8) 10 Q. B. D. 378.
(9) 9 Q. B. D. 701.
(10) 20 Q. B. D. 832.
(11) Law Rep. 2 P. C. 106.
(12) 6 App. Cas. 657.
(13) 6 Q. B. D. 376.

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Under the old practice the applicant had a right to go to every Court, one after the other, no matter how often he was refused. And a Vice-Chancellor had jurisdiction to issue the writ: *In re Belson* (1). In *Reg.* v. *Latimer* (2) Lord Esher M.R. and Bowen L.J. sat in the Court for Crown Cases Reserved.

Further, the appellant having been once discharged could not be re-arrested upon the same writ. Sect. 6 of 31 Car. 2, c. 2, enacts that a person set at large upon a habeas corpus should not be again imprisoned or committed for the same offence except by the order and process of such Court wherein he should be bound by recognizance to appear, or other Court having jurisdiction of the cause. The Court of Appeal had clearly no jurisdiction to recommit, and its order was futile.

Lastly, whether an appeal does or does not lie from an order refusing a habeas corpus or from an order remanding a prisoner, sect. 19 of the Judicature Act 1873 could not have intended to create a new right of appeal against the liberty of the subject. It would require clear and strong words to justify such a construction. It would be an absolute novelty; the procedure on habeas corpus has existed for centuries; and no one has ever heard of an appeal against an order discharging a prisoner.

Jeune Q.C. and *Danckwerts*, for the respondent Hakes:—

Whatever may have been the old practice in habeas corpus the order nisi made Hakes a party to the proceedings, for he was required to shew cause. Therefore he had a right to appear and argue that the order should not be made absolute; also to ask for his costs if successful. Then if a party and unsuccessful why has he not a right to appeal? He is not less a party when the order is made absolute than he was when it was an order nisi. In many cases, e.g. detaining a child, the person having the custody and the person applying are equally interested and equally parties. In the Crown Office Rules 1886 rr. 239 and 245 the person to whom the writ of habeas is directed is called "the party"; and "the party in whose favour judgment is given" is to draw up the order of the Court. And by sect. 100 of the Judicature Act 1873 "'party' shall include every person

(1) 7 Moore, P. C. 114.

(2) 17 Q. B. D. 359.

served with notice of or attending any proceeding, although not named on the record." Under the Judicature Acts and rules there is an appeal in all cases of habeas corpus whether the order is made absolute or not. The intention of the Legislature was to assimilate the practice in all matters. Sect. 47 of the Judicature Act 1873 makes criminal matters the sole exception to the right of appeal. In the present case the proceedings were not a criminal matter. *Dale's and Enraght's Cases* (1) are strong authorities to shew that neither an ecclesiastical offence nor disobedience to an order of Court nor contempt are criminal matters; and that the Court of Appeal has jurisdiction under sect 19 of the Judicature Act 1873 to entertain an appeal in habeas corpus. In those cases the Court of Appeal (Lord Selborne L.C., Baggallay and Brett L.JJ.) on December 18 1880 released Dale and Enraght pending the appeal from the refusal of the Queen's Bench Division to grant a writ of habeas corpus: see Short's Crown Office Rules 1886 p. 88, n. *Green* v. *Lord Penzance* (2) is also an authority for the respondent. That an attachment for contempt is not a criminal matter was the opinion of the Courts of Exchequer and Exchequer Chamber in *Cobbett* v. *Slowman* (3): and in *In re Freston* (4) the Court of Appeal entertained an appeal by a solicitor arrested for contempt, though they held the contempt was of a criminal nature, and the attachment for contempt punitive. Again in *In re Dudley* (5), a similar case, the appeal was heard; so in *In re Johnson* (6). In *In re Wray* (7) the Court of Appeal heard an appeal from an order of North J. refusing to attach a solicitor by way of punishment for default in payment of money. In the above cases the right of appeal was not questioned; but in *Jarmain* v. *Chatterton* (8) it was, and the Court of Appeal held that an appeal lies from a refusal to commit for contempt. In *Ex parte Woodhall* (9) the Court of Appeal expressly intimated the opinion that they had jurisdiction in habeas corpus where the subject-matter of the proceedings in respect of which the application for habeas corpus

(1) 6 Q. B. D., at p. 474.
(2) 6 App. Cas. 657.
(3) 4 Ex. 747; 9 Ex. 633.
(4) 11 Q. B. D. 545.
(5) 12 Q. B. D. 44.
(6) 20 Ch. D. 68.
(7) 36 Ch. D. 138.
(8) 20 Ch. D. 493.
(9) 20 Q. B. D. 832, 836, 838.

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was made was not criminal. In *Reg.* v. *Barnardo* (1) the Court of Appeal has just decided that an order for the issue of an attachment which is made to enforce the doing of something, the not doing of which is not criminal, is not a "judgment in a criminal cause or matter," and that an appeal lies. An ecclesiastical suit is not a criminal matter: the evidence of parties and their wives is always taken: see *Bishop of Norwich* v. *Pearse* (2). To make a matter criminal the Crown must be a party.

[Lord Herschell referred to *In re Dean of York* (3).]

Sect. 19 gives the Court of Appeal jurisdiction to hear appeals in all matters not criminal, and power to enforce its orders, and still larger powers to make orders are given by Order lviii. r. 4.

[They also referred to *Reg.* v. *Holl* (4); *Reg.* v. *Whitchurch* (5); *Loughborough Highway Board* v. *Curzon* (6); and *Ex parte Walker* (7); as to what is "a criminal matter": to Comyns' Dig. "Habeas Corpus" (A); Barnes, Not. Cas. 222; *Wood's Case* (8); *Bushell's Case* (9); *Crowley's Case* (10); *In re Belson* (11); *In re Cobbett* (12); and *Ex parte Besset* (13), as to the jurisdiction of different Courts to grant habeas corpus: to *Long Wellesley's Case* (14) as to punishment for contempt: to Fitzherbert, Registrum Brevium, 64, 67; Godolphin, Repertorium Canonicum, 631; *R.* v. *Eyre* (15); *Collin's Case* (16); and *Reg.* v. *Ball* (17), as to the form of writs de excommunicato capiendo; escape; and recommitment; also to *Ex parte Child* (18); and *Dugdale* v. *Reg.* (19).]

Sir *E. Clarke* S.-G. and *R. S. Wright* for the respondent Lord Penzance did not desire to argue the question of jurisdiction.

Sir *H. Davey* Q.C. replied.

(1) 23 Q. B. D. 305, 309.
(2) Law Rep. 2 Ad. & Ecc. 281.
(3) 2 Q. B. 1.
(4) 7 Q. B. D. 575.
(5) 7 Q. B. D. 534.
(6) 17 Q. B. D. 344.
(7) 22 Q. B. D. 384.
(8) 2 W. Bl. 745; 3 Wils. 172.
(9) Vaughan, 135.
(10) 2 Swan. 1.
(11) 7 Moo. P. C. 114.
(12) 14 M. & W. 175.
(13) 6 Q. B. 481.
(14) 2 Russ. & My. 639, 665, 666.
(15) 2 Stra. 1189.
(16) Sir F. Moore's Cas. 354.
(17) 6 Mod. 78.
(18) 15 C. B. 238.
(19) 2 E. & B. 129.

The House took time for consideration.

The appeal was re-argued on May 19, 20, 22, 1890 (before Lord Halsbury L.C., and Lords Watson, Bramwell, Herschell, Macnaghten, Morris and Field) by Sir *W. Phillimore* and *Hansell* (Sir *H. Davey* Q.C. with them) for the appellant and by *Jeune* Q.C. and *Danckwerts* for the respondent Hakes.

The respondent's counsel were informed by Lord Halsbury L.C. that they need not argue the question whether the appeal in this case to the Court of Appeal was in a "criminal cause or matter" within s. 47 of the Judicature Act 1873. In addition to the cases referred to on the first hearing, they cited *Attorney-General for Hong Kong* v. *Kwok-a-Sing* (1), and *Reg.* v. *Mount* (2), as precedents for reversing an order discharging a prisoner under a habeas corpus; and they relied on *Dugdale* v. *Reg.* (3) as a precedent for arresting and re-committing a person who had been discharged from prison by order of a judge. They also argued that there was at all events an appeal against that part of the order of the Queen's Bench Division which directed the body of the applicant to be brought up before the Court; that the proceedings were irregular; that the applicant ought to have been brought up before the Queen's Bench Division before he was discharged, and that rule 244 of the Crown Office Rules 1886 was ultrà vires. The rest of the arguments on both sides appear sufficiently from the judgments.

The respondent's counsel also referred to: *Reg.* v *Barnardo, Gossage's Case* (4); *O'Shea* v. *O'Shea and Parnell* (5); *Overseers of Walsall* v. *London and North Western Ry. Co.* (6); *Needham* v. *Needham* (7); *Rodger* v. *Comptoir d'Escompte de Paris* (8); *Toulmin* v. *Millar* (9); *Yeo* v. *Tatem* (10); *Bourgoin* v. *La Compagnie, &c.* (11); *Witt* v. *Corcoran* (12); *Great Western Ry. Co.* v. *Swindon and Cheltenham Ry. Co.* (13); *Pringle* v. *Secretary*

(1) Law Rep. 5 P. C. 179.
(2) Law Rep. 6 P. C. 283.
(3) 2 E. & B. 129.
(4) 24 Q. B. D. 283.
(5) 15 P. D. 59.
(6) 4 App. Cas. 30.
(7) 1 Phill. 640, 645.
(8) Law Rep. 3 P. C. 465.
(9) 12 App. Cas. 716.
(10) Law Rep. 3 P. C. 696, 702.
(11) 5 App. Cas., at p. 397.
(12) 2 Ch. D. 69.
(13) 9 App. Cas. 787.

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of State for India (1); *R.* v. *Bethell* (2); *R.* v. *Reader* (3); *Anon.* (4); *R.* v. *Marks* (5); *R.* v. *Martins* (6): *Alsept* v. *Eyles* (7); *Leonard Watson's Case* (8); *Falkland Islands Co.* v. *Reg.* (9); *Reg.* v. *Bertrand* (10); *In re Lord Bishop of Natal* (11); *Flower* v. *Lloyd* (12).

Sir *W. Phillimore* replied.

The House took time for consideration.

Aug. 5. LORD HALSBURY, L.C.:—

My Lords, probably no more important or serious question has ever come before your Lordships' House. For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might—see *Ex parte Partington* (13)—make a fresh application to every judge or every Court in turn, and each Court or Judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed: *City of London's Case* (14).

In days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined. The right to an instant determination as to the lawfulness of an existing imprisonment, and the twofold quality of such a determination that, if favourable to liberty it was without appeal, and if unfavourable it might be renewed until each jurisdiction had in turn been

(1) 40 Ch. D. 288.
(2) 5 Mod. 19.
(3) 1 Str. 531.
(4) Vent. 330.
(5) 3 East, 157.
(6) 9 Dowl. 194.
(7) 2 H. Bl. 108.
(8) 9 A. & E. 731.
(9) 1 Moo. P. C. (N.S.) 299.
(10) Law Rep. 1 P. C. 520.
(11) 3 Moo. P. C. (N.S.) 115.
(12) 6 Ch. D. 297.
(13) 13 M. & W. 679, 684.
(14) 8 Rep. 121 b.

exhausted, have from time to time been pointed out by Judges as securing in a marked and exceptional manner the personal freedom of the subject. It was not a proceeding in a suit but was a summary application by the person detained. No other party to the proceeding was necessarily before or represented before the Judge except the person detaining, and that person only because he had the custody of the applicant and was bound to bring him before the Judge to explain and justify, if he could, the fact of imprisonment. It was as Lord Coke described it, festinum remedium. The Act of Charles II., commonly called the Habeas Corpus Act, did but provide remedies and penalties to enforce the known state of the law and to prevent its evasion. It was confined to criminal cases or alleged criminal cases, and provided that except in cases of treason and felony plainly expressed upon the face of the warrant its strongest provision should have operation.

But in 1816, the Act 56 Geo. 3, c. 100, supplied the omission to provide for cases where the cause of detention was neither crime nor debt. The preamble of the Act recites both the efficiency and the quickness of the remedy in these words:— "Whereas the writ of habeas corpus hath been found by experience to be an expeditious and effectual method of restoring any person to his liberty who hath been unjustly deprived thereof:" "And whereas extending the remedy of such writ and enforcing obedience thereunto, and preventing delays in the execution thereof, will be advantageous to the public;" "And whereas the provisions made by an Act passed in England in the 31st year of King Charles the Second, intituled 'An Act for the better securing the liberty of the subject, and for prevention of imprisonment beyond the seas,' and also by an Act passed in Ireland in the 21st and 22nd years of His present Majesty, intituled 'An Act for better securing the liberty of the subject,' only extend to cases of commitment or detainer for criminal or supposed criminal matter: Be it therefore enacted, &c. . . . That where any person shall be confined or restrained of his or her liberty (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process in any civil suit) within that part of Great Britain called England,

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Dominion of Wales, or Town of Berwick-upon-Tweed, or the Isles of Jersey, Guernsey, or Man, it shall and may be lawful for any one of the Barons of the Exchequer, of the degree of the Coif, as well as for any one of the justices of one bench or the other, and where any person shall be so confined in Ireland, it shall and may be lawful for any one of the Barons of the Exchequer, or of the justices of one bench or the other in Ireland, and they are hereby required upon complaint made to them;" then follow the provisions with which we are familiar. The Act proceeds thus: "III. And be it further enacted by the authority aforesaid that in all cases provided for by this Act, although the return to any writ of habeas corpus shall be good and sufficient in law, it shall be lawful for the justice or baron, before whom such writ may be returnable, to proceed to examine into the truth of the facts set forth in such return by affidavit or by affirmation (in cases where an affirmation is allowed by law), and to do therein as to justice shall appertain; and if such writ shall be returned before any one of the said justices or barons, and it shall appear doubtful to him, on such examination, whether the material facts set forth in the said return or any of them be true or not, in such case it shall and may be lawful for the said justice or baron to let to bail the said person so confined or restrained, upon his or her entering into a recognizance with one or more sureties, or in case of infancy or coverture, or other disability, upon security by recognizance, in a reasonable sum, to appear in the Court of which the said justice or baron shall be a justice or baron upon a day certain in the term following and so from day to day as the Court shall require, and to abide such order as the Court shall make in and concerning the premises; and such justice or baron shall transmit into the same Court the said writ and return, together with such recognizance, affidavits, and affirmations; and thereupon it shall be lawful for the said Court to proceed to examine into the truth of the facts set forth in the return in a summary way by affidavit or affirmation (in cases where by law affirmation is allowed), and to order and determine touching the discharging, bailing, or remanding the party."

It will be observed that the judge is to satisfy himself, and if

he is satisfied that the matter returned is matter which if true would be a good return he is to do what justice requires, i.e. if he thinks the imprisonment lawful, to remand to custody; if otherwise, to enforce the immediate liberation. If, on the other hand, he is doubtful, he may hold to bail. The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom.

My Lords, I have insisted at some length upon the peculiarities of the procedure, because I think one cannot suppose that the Legislature intended to alter all the procedure by mere general words without any specific provision as to the practice under the writ of habeas corpus or the statutes which from time to time have regulated both its issue and its consequences. My Lords, I do not deny that the words of sect. 19 literally construed are sufficient to comprehend the case of an order of discharge made upon an application for discharge upon a writ of habeas corpus; but it is impossible to contend that the mere fact of a general word being used in a statute precludes all inquiry into the object of the statute or the mischief which it was intended to remedy.

In the great case of *Stradling* v. *Morgan* (1), the Court of Exchequer was called upon after verdict to construe the statute upon which the action was brought and which used the words "*any* treasurer, receiver or minister accountant," and the Court held that however wide the words the statute must be taken not to have meant to use the words in their absolute generality, and yet all agreed that the receiver in question was within the words of the statute. In the argument and the judgment illustrations are given of the principle upon which statutes ought to be expounded, which have many times since been referred to as satisfactory in reason and common sense. Thus the word "presently" answer to the creditor (i.e., immediately) in a statute has been construed to mean not that the extenders shall immediately pay, but immediately become debtors. The words "no writ shall abate by exception of non-tenure of parcel but for the quantity of the non-tenure which is alleged," were held to mean only some writs shall not abate, which determination is quite

(1) Plowd. 198 b.

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contrary, it is said, to the text. So the statute of Marlbridge enacts that "none from henceforth shall cause any distress that he has taken to be driven out of the county where it was taken," and says further, "if the lord presume to do so against his tenant he shall be grievously punished by amercement." Yet in 1 Hen. 6 it was held that if one had a manor in one county and a person holds lands which he has in another county of this manor, "it was lawful for the lord to distrain for the services and to carry the distress to the manor into the other county where the manor is, notwithstanding the said statute. And yet it seems contrary to the letter of the Act, as it is in truth contrary to the generality of the letter of the Act. But the Judges have expounded the intent of the makers of the Act not to extend to the lord, but where the seigniory and tenancy are in the same county. So that by such exposition made according to the intent of the Act the generality of the words is abridged."

From these and similar examples a canon of construction has been arrived at which has often been quoted but which is so important with reference to the question now before your Lordships that I quote it once again:—

"From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion" (1).

(1) See *Stradling* v. *Morgan*, Plowd., at p. 205 a.

My Lords, if the Judicature Acts are looked at by the light of such principles as are here indicated I cannot conceive it to be possible that the framers of those Acts had in their minds the dealing with such an important branch of the law of this country by the use of one word, the necessity for the use of which is amply satisfied by the other provisions of the Acts in question. It was the known and well-settled state of the law that a discharge under a writ of habeas corpus was final. And the Act from which I have quoted in the latter part of the 3rd section calls upon the Court to "order and determine touching the discharging the party detained." Undoubtedly the construction of these words would have been according to the then known course of the law a final and absolute discharge, and if it had been expressed in words the Judicature Acts could not have dealt with such a discharge without repealing the statute. Neither of the statutes 31 Car. 2 and 56 Geo. 3 is referred to in the voluminous schedules of those Acts, and I am brought to the conclusion that they were intended to deal with the cases of hostile litigants each representing a personal interest; and without hearing or giving an opportunity to be heard, it would be impossible for the High Court to adjudicate. This, however, is a proceeding on the part of the Court itself examining the lawfulness of the imprisonment for itself; and though it may, it is not bound to do more than satisfy itself of the lawfulness or unlawfulness of an imprisonment. My Lords, it is upon this part of the case that I think the absence of a proper appellant is important.

I admit at once that if I were to assume an appeal it would be easy to find a person who might appropriately represent the interests of those who authorized the imprisonment. The original complainant, the Judge, or even the gaoler, might properly fill that character; but when the nature of the transaction is such that there is no one whom the Court would be bound ex debito justitiæ to hear, I think it reflects some light upon the nature of the proceeding and upon whether the Court must regard it as a proceeding in which there cannot be a right of appeal. It can hardly be disputed that no machinery is provided for giving effect to an appeal against a discharge under a writ of habeas corpus. Is it possible that the Legislature, intending to give

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an appeal for the first time and upon a matter of such supreme constitutional importance, yet left the matter unprovided for? I cannot think so. The Court of Appeal, indeed, disregard this consideration as being immaterial, since they are of opinion that the appeal is certainly given, and that they are bound so to declare the law whatever may be the consequences; but though I quite agree with that proposition, if I am to assume an appeal certainly given, yet it is surely one mode of arriving at the intention of the Legislature to consider whether the machinery provided by the statute is appropriate to the alleged intention.

The section under construction I think was framed with a view to the creating of a Court of Appeal, and giving the powers necessary for the exercise of the jurisdiction so created. If in the words themselves or in the machinery ancillary to the exercise of the jurisdiction it can be discovered that the Legislature did not intend the exercise of the jurisdiction in a particular case, it is no straining of the words to assume the limit which the Legislature has thus expressed by the limitation of the machinery.

The case of *Attorney-General for Hong Kong* v. *Kwok-a-Sing* (1) appears to me to be entirely irrelevant. If it were an authority at all it would only be relevant to shew (what it was hardly contended could be shewn) that an order of discharge under a writ of habeas corpus was always open to review, and independently of the Judicature Act. But, in truth, there are two grounds upon which that decision is intelligible. Apart from any practical determination of existing litigation, the Judicial Committee can do what the High Court cannot do, i.e., give advice upon abstract propositions of law. Secondly, it can advise the exercise of Her Majesty's prerogative with respect to the appeals from Her Colonial Courts in matters where undoubtedly no appeal lies in this country. Indeed, the particular discussion arose in that case upon a criminal charge, and the real point in debate was whether a discharge under the circumstances there existing was a case under the provisions of 31 Car. 2.

In the case of *Reg.* v. *Mount* (2) the Judicial Committee were giving an opinion as to the course to be pursued where in the

(1) Law Rep. 5 P. C. 179. (2) Law Rep. 6 P. C. 283.

particular colony no provision had been made for carrying out a sentence of penal servitude, although that question assumed the form of an appeal. But, as I have said, both these cases are irrelevant, or they prove too much; and when the relation to the colonies is borne in mind, it is obvious that neither case can have any relevancy to the true construction of the 19th section of the Judicature Act.

I am quite at a loss to understand what relation *Dugdale* v. *Reg.* (1) has to the matter in hand. A misdemeanant convicted and sentenced gave bail in error, and by mistake was permitted to be at large, when, as afterwards turned out, he had not complied with the conditions under which alone he could have been permitted to be at large. The proceedings which released him were without jurisdiction, and the Court having jurisdiction remanded him to custody. Technically, I think, it was an escape, and he was recaptured to undergo his imprisonment on an existing judgment, which had not been qualified or set aside and the execution whereof had only been interrupted by mistake.

My Lords, it would be a very small point here to decide as to the costs for the purpose of founding jurisdiction; but I am of opinion that if the Court had no jurisdiction to entertain the appeal, they had no jurisdiction to award costs.

My Lords, I desire to express no opinion whether a new significavit can be followed by a new order of arrest—that is a question which does not now arise and which may hereafter arise, and I wish to keep myself quite free to decide that question when it shall arise. Whether it can or cannot does not seem to me to reflect any light upon the question now under debate. I entertain no doubt that the writ delivered to the sheriff is spent by the execution by the sheriff of the mandate therein contained, and certainly cannot be made the foundation for a fresh arrest or for a detention which has once by lawful authority been declared to be unlawful. As to the power to retake it is enough to say that the sole authority which Mr. Jeune's industry and ability have been enabled to discover is impliedly an authority the other way, inasmuch as the writ in

(1) 2 E. & B. 129.

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the "Registrum Brevium" recites an unlawful deliverance from prison as the ground and foundation of the right to recapture.

Except so far as may be inferred from what I have said as to the argument which would imply a repeal of the Habeas Corpus Act, I do not desire to express any opinion upon what the law would be if a refusal to discharge should be the subject of appeal.

My Lords, upon the merits of this appeal I have of course formed no opinion. The preliminary point has alone been argued; and I will only say that if it be true, as one of the parties contends, that there has been a disobedience to the law obstinate and persistent, I have no doubt at all that the law either is or can be made strong enough to deal with it. But your Lordships are here determining a question which goes very far indeed beyond the merits of any particular case. It is the right of personal freedom in this country which is in debate; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last Court of Appeal.

For these reasons I am of opinion that the judgment of the Court of Appeal was wrong, and I move your Lordships that that judgment be reversed.

LORD WATSON:—

My Lords, I also am of opinion that the judgment of the Court of Appeal should be reversed. My reasons for coming to that conclusion are fully and clearly expressed in the judgments about to be delivered by my noble and learned friends, Lord Bramwell and Lord Herschell, which I have had an opportunity of considering in print, and in which I entirely concur.

LORD BRAMWELL:—

My Lords, I think that this appeal should be allowed on the ground that the Court of Appeal had no jurisdiction to entertain

the appeal to them. That an appeal from the decision of a judge or court on the grant or refusal of a writ of habeas corpus, and on the adjudication on its return, would be reasonable, this case abundantly shews. I do not say so on account of the original question between the parties (the particulars of which are wholly unknown to me), but on account of the question which has resulted from the application for the writ of habeas corpus. A Court of competent jurisdiction has decided that the appellant has broken the law, and has suspended him from the exercise of his functions as a priest. He has deliberately disobeyed the orders of the Court, on no ground except that he chose to do so; he has been sent to prison for his contumacy. And the question, on the return to a writ of habeas corpus, for the Divisional Court and Court of Appeal, was whether that imprisonment was lawful or not; in other words, whether he was to be punished, or go unpunished. This is a serious question, and there can be no doubt that out of proceedings on writs of habeas corpus, and on applications for them, most serious questions may and do arise, much more important than the majority of those which are the subject of appeal.

However, as has been said, we have got on without such appeals hitherto, and might continue to do so and thrive. I say "without such appeals," for, with all respect, I cannot agree that going first to a judge of one court, and then, on being refused by the judge, going to a court, and, on being refused by one court, going to another, was or is an appeal. The Court applied to after refusal by a judge or other Court was not exercising an appellate jurisdiction in entertaining the application. It was exercising a primary jurisdiction. It need not have heard of the former application, nor known of the materials on which it was founded; and, indeed, those before it might be different from the former. If indeed such a proceeding was an appeal that appeal exists still. Clearly where the first application is to a single judge, and where to the High Court, the Lord Chancellor could grant the writ refused by them on application to him, and vice versâ. Whether if one division of the High Court, before the Queen's Bench, Common Pleas, and Exchequer Divisions were fused, had refused the writ, then another division

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would have been bound to entertain an application for one, I know not. If yes, then the Judicature Act left the matter as it was before. Anyhow there is the possibility of a second application now as of right, so that there is the less need for an express appeal to supply the want of being able to try more than one tribunal. The second application may be "improper," as Lord Justice Cotton says, but it is one that may be made and must be entertained. Still the question is, has the Judicature Act provided such an appeal? That it has done so intentionally I think no one can suppose. It is impossible that if an appeal had been intended there should not have been some particular provisions as to its procedure up to and after the final order, and there are none. The very able and learned arguments of Mr. Jeune and Mr. Danckwerts have shewn or suggested that in some cases, perhaps, a reversal of an order to discharge a person brought up on a writ of habeas corpus might leave him subject to proceedings for restoring him to custody; for instance where a sentence is unexpired. And possibly Mr. Cox may in some way be got at; I do not know. But there are some cases where the discharge is of such a character that its effect cannot be undone.

I say that the absence of specific procedure in the Judicature Act to enforce an order reversing an order of discharge on a writ of habeas corpus, and the possible futility of such reversal, is a strong argument to shew that an appeal does not lie. I cannot, with great submission, agree that the Court may reverse, though no good may come of it. If no good may come of it eventually, I think the argument is strong to shew that the power is not given. Of course if the statute in express terms said the appeal should lie, it must be obeyed. But when the question is one of construction, surely it is a good argument to shew that a particular construction would be futile.

What is the substance of the appeal? I speak of where there is a discharge. There may be a writ without a previous rule nisi, or with one. It cannot be contended that an appeal will lie where there is a rule nisi, and not where there is not. Indeed where there is a rule nisi on sufficient primâ facie materials, and the body is brought up, or the matter is discussed as though it

were, it seems to me it would be wrong to discharge the rule nisi if there were an appeal, and the discharge were revoked. In this case the Queen's Bench Division made absolute the rule for a habeas corpus, and also ordered that the appellant should be discharged without being brought up. How can it be right to discharge the rule for the habeas corpus? What is the consequence? Does the bringing up of the body become unlawful, or would it have been if the writ had issued, and the body been brought up? These considerations shew that the substantial question is, whether the order for the discharge of the body which is to be brought up, or treated as though brought up, was right. When there is an order of discharge I have a difficulty in seeing how a Court of Appeal can undo that order. The body is gone. The Court of Appeal cannot reverse what has been done. It cannot give the judgment that ought if right to have been given, viz., that he be remanded. He is not there. No doubt power could be given to it to remedy the error. But without express power it can do nothing. It does not issue the process from the Ecclesiastical Court, nor the writ de contumace recapiendo if there is one.

As to the case of *Dugdale* v. *Reg.* (1), I do not understand it. I have no notion where the prisoner was or what was done with him. Since writing this judgment, and since it was printed, I have been favoured with a copy of the opinion of my noble and learned friend Lord Herschell, with which I entirely agree, and which shews what that case was, and it does not in any way help the respondent.

On these grounds I think an appeal was not intended.

But then there are the words of the statute, "The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order of Her Majesty's High Court of Justice, or any judges or judge thereof." I have an indistinct misgiving whether in awarding or disposing of a writ of habeas corpus a judge of the High Court, or the High Court itself, is acting as a court or judge of a court of judicature. There is no *lis*; there is no action; these proceedings are entitled ex parte. No doubt sect. 16 transfers the power to grant writs

(1) 2 E. & B. 129.

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of habeas corpus, but is that power a power of judicature? Sect. 19 speaks of a judgment or order, i.e., an order in the nature of a judgment. What I am now expressing is only a doubt; but further, I think, the proper way of dealing with sect. 19 and sect. 18, is to consider their object to be to establish a Court of Appeal, not to make things appealable of a character not appealable before. The section begins, "The Court of Appeal shall have jurisdiction, &c." Sect. 18 transfers certain powers to it, in which are certainly not included the power of hearing an appeal from a decision as to a writ of habeas corpus. I do not say that appeals do not lie in cases where they did not before. I say that to give such appeals was not the object of sects. 18 and 19.

But still further, though the words are there, though they comprehend in words the case of an appeal from a decision on the return of a writ of habeas corpus, yet if the result would be futile, or lead to an absurdity, the right way of dealing with those words is to put a limit on them; as for instance thus, "shall have jurisdiction to hear appeals from any judgment or order *appealable* or where the Court of Appeal or the Court appealed from *can execute the order or judgment of the Court of Appeal.*" I submit that this is perfectly legitimate. All judges who have had occasion to speak of it have unhesitatingly dealt in this way with sect. 38 of 30 & 31 Vict. c. 131. And see Maxwell on Statutes, p. 242, where many cases to the same effect are collected.

On these grounds I think this judgment should be reversed. My reasons would, perhaps, apply to a case where the prisoner had been remanded, but I limit my opinion to where he has been discharged. Of course I think that part of the order appealed from which orders payment of costs to Mr. Hakes, the appellant in the Court of Appeal, should be reversed, as there was no jurisdiction to entertain the matter at all. Even if there was, I do not see why he should have costs from Mr. Cox. True I think that Mr. Hakes was a proper appellant if there could be an appeal, though the question was not one between him and Mr. Cox. And that is one of the difficulties I feel as to whether there could be an appeal. Of course it is right to give him an

opportunity of being heard against the discharge and of informing the Court as to the facts, but not him exclusively. Suppose he had died or left the parish?

In the result I think the question is, is there an appeal from an order discharging a person brought up on habeas corpus? I think that sects. 18 and 19 of the Judicature Act are directed to the establishment of a Court of Appeal, and not to making a matter the subject of appeal not formerly so, and different in kind and character from those previously the subject of appeal. I think that if an order of discharge is a judgment or order of judicature, and so within the very words of sect. 19, a limitation must be put on them excluding such appeals, to avoid the futility, inconvenience, and incongruity which would otherwise result.

LORD HERSCHELL:—

My Lords, the preliminary question argued upon the hearing of this appeal is one of great importance. It touches closely the liberty of the subject, and the protection afforded by discharge from custody under a writ of habeas corpus. The law of this country has been very jealous of any infringement of personal liberty, and a great safeguard against it has been provided by the manner in which the Courts have exercised their jurisdiction to discharge under a writ of habeas corpus those detained unlawfully in custody.

It will be convenient, before proceeding to an examination of the section of the Judicature Act upon which this case turns, to state briefly the mode in which the Courts have administered the law in relation to that writ. It was always open to an applicant for it, if defeated in one Court, at once to renew his application to another. No Court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each Court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from court to court until he obtained his liberty. And if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right

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to his liberty could not afterwards be called in question. There was no power in any Court to review or control the proceedings of the tribunal which discharged him. I need not dwell upon the security which was thus afforded against any unlawful imprisonment. It is sufficient to say that no person could be detained in custody if any one of the tribunals having power to issue the writ of habeas corpus was of opinion that the custody was unlawful.

This was the state of the law at the time the Judicature Act was passed. If the contention of the respondent is to prevail, that statute has effected a grave constitutional change. The discharge from custody by a Court of competent jurisdiction no longer avails to protect from further proceedings. The propriety of the discharge may be questioned in the Court of Appeal, and even if that Court should concur with the Court below, an appeal would lie to your Lordships' House, so that although the Court of First Instance and the Court of Appeal should concur in thinking the custody illegal, their decisions might be set aside by a majority of this House. It is not easy to exaggerate the magnitude of this change; nevertheless it must be admitted that if language of the Legislature, interpreted according to the recognised canons of construction, involves this result, your Lordships must frankly yield to it, even if you should be satisfied that it was not in the contemplation of the Legislature.

Reliance is naturally placed by the respondent upon the broad general words of the 19th section—"The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice." It cannot be denied that an order for the discharge of a person in custody, such as was made in the present case, is, primâ facie, an order to which this section applies. It does not come within any of the exceptions to which reference is made in the section. It was, indeed, somewhat faintly argued by the learned counsel for the appellant, that this was an appeal in "a criminal cause or matter" within the meaning of sect. 47. But, in my opinion, they failed to establish this proposition. And if there were nothing in the statute which could be appealed to as shewing that the Legisla-

ture intended some further limitation to be put upon the general words used, I think it might be impossible to resist the respondent's contention.

But the section contains two clauses. That which confers the right of appeal, and the jurisdiction to hear and determine it, is immediately followed by a provision which is obviously intended to make the power of review complete and effectual, by furnishing the means of enforcing it. The learned judges in the Court below considered that it was quite immaterial to inquire what would be the effect of their judgment, or how it could be enforced. If an appeal were given in such a case as the present in specific terms, I should agree with them. It would then be their duty to entertain it and to pronounce their judgment, even if there were no means of compelling obedience to it. But the attention of the learned judges does not appear to have been drawn to the language of the second branch of the section, or to the bearing which it might have upon the construction to be put upon the earlier words.

It cannot, I think, be denied that, for the purpose of construing any enactment, it is right to look not only at the provision immediately under construction, but at any others found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation. The enactment following the words which confer jurisdiction to hear and determine appeals gives to the Court of Appeal, for the purposes of the "enforcement of any judgment or order made on any such appeal," all the power, authority and jurisdiction by the Act vested in the High Court of Justice.

The first observation I have to make is this. I think it must be held that the Court of Appeal has no power to enforce its judgments beyond that which is here conferred. Even if it be conceded that, in the absence of any such provision, some authority to enforce its judgments might be implied, it would be contrary to sound principles of construction to extend by implication the express power given. The Court, then, has the same power to enforce its judgments as the High Court, and is not empowered to use any further or other means. It appears to me,

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therefore, legitimate and relevant to inquire whether, in any particular class of cases, the Court of Appeal has been left powerless to enforce its orders in case its conclusion should differ from that arrived at by the Court below.

The case with which we have to deal is an order discharging a person from custody under a writ of habeas corpus. It was said, indeed, that the order of the Queen's Bench Division was two-fold and might be treated as two separate orders; first, to bring up the body of the applicant, and second, to discharge him from custody. I shall revert to this argument presently; but, for the moment, I shall treat it simply as an order discharging from custody. Has the Court of Appeal any power effectually to review such an order, and to undo what was done by the Court below? For the reasons I have already given I think this must be determined by the answer to the further question, has the High Court any power to enforce an order for the arrest of a person at large under such circumstances as the present, or in any like case? It needs no argument to prove that the High Court is destitute of any such power. It has inherited the combined powers of the Courts whose functions were transferred to it; but none of these had any jurisdiction or authority to review a discharge by a competent court under a writ of habeas corpus or to enforce the arrest of one thus freed from custody. And I need hardly add that they possessed no general power of arrest for the purpose of enforcing their judgments. It seems to me to follow that however wrong the Court of Appeal might think a discharge to have been it would be powerless to order a re-arrest, or, at least, to enforce such an order.

Great reliance was placed upon the case of *Dugdale* v. *Reg.* (1), which it was said shewed that the Court of Queen's Bench had the power to order the re-arrest and commitment to custody of a person improperly discharged. In that case the defendant had been convicted and sentenced to two years' imprisonment at the quarter sessions. He brought error on this judgment, which, however, was in part affirmed by the Queen's Bench, and having been bailed pending the suit, he was remanded to custody. He then took the necessary steps to carry the writ to the Exchequer

(1) 2 E. & B. 12

Chamber, and obtained his discharge by acknowledging recognizances before Platt B. at chambers under the 8 & 9 Vict. c. 68, and 9 & 10 Vict. c. 24. These recognizances, however, did not comply with the statutes, under which alone he was entitled to be out on bail pending the appeal. The discharge was, in fact, without jurisdiction. For the purpose of testing the question of jurisdiction a rule was obtained to shew cause why he should not be again apprehended and recommitted to the custody of the keeper of the House of Correction, "in execution of the judgment in this prosecution." This rule was made absolute, but he was not arrested merely by virtue of this rule. A warrant was granted by Erle J. for his recommittal, reciting the judgment and sentence, and stating the recommittal to be "in execution of the judgment in the said prosecution." The defendant in that case was at large during the currency of a valid sentence and judgment, having been set free pending an appeal by a learned judge acting without jurisdiction. I am unable to see the bearing of that case upon the present, or how it shews that when a prisoner has been discharged from custody, under a writ of habeas corpus, by a court of competent jurisdiction, there can be any power in the Court to issue a warrant for his recommitment.

The counsel for the respondent called attention to Order LVIII., rule 4, and insisted that this supplemented the power conferred on the Court of Appeal by the section under discussion. That order provides that the Court of Appeal shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, "and to make such further or other order as the case may require." It was these latter words that were relied on. I think it is a somewhat extravagant proposition that a rule such as this would enable the Court to order the re-arrest of a person discharged under a writ of habeas corpus and to enforce its order. I think it impossible to hold that it gave any such authority or enlarged the power to enforce its order which is vested in the Court of Appeal by the 19th section of the Act. It was argued, however, that it was unnecessary to empower the Court of Appeal to remit to custody a person erroneously discharged by the Court below, seeing that as soon as the order of that Court was reversed the person discharged

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might again be arrested by the sheriff, and indeed that it would be his duty upon receiving notice of the order of the Court of Appeal so to arrest him. No authority was cited, nor could any precedent be appealed to in support of this proposition, and I find myself wholly unable to assent to it. Where the sheriff has taken the person named in the writ and handed him to the gaoler for custody under it, his duty is at an end, save in the case of an escape. And the suggestion that a discharge by a court of competent jurisdiction becomes, when its order is reversed by a superior court, equivalent to an escape, will not bear examination.

It was said that the writ commanded the sheriff to attach the body of the appellant "until he shall have made satisfaction for the contempt," and that no such satisfaction having been made, the writ was still in force and effectual to authorize his re-arrest. But the limitation, "unless he shall have been sooner discharged by a court of competent jurisdiction," must be implied in this case just as much as if the warrant had been to attach the person named for a definite term.

Then it was said that the appellant might be arrested again, inasmuch as the sheriff had not yet notified to the justices how he had executed the precept. I am unable to follow this argument. In the present case the sheriff would make a true and sufficient return by stating that he had attached the appellant by his body, and delivered him to the gaoler for safe custody under the writ. And if he were to add that the prisoner had been discharged from custody by the High Court of Justice, the return would in my opinion none the less be good and sufficient. When the sheriff returns that he has not executed the writ, and that the party cannot be found within his bailiwick, the Court is empowered by sects. 4, 5, 6 and 7 of the 5 Eliz. c. 23 (which by sect. 1 of the 53 Geo. 3, c. 127, is made applicable to writs de contumace capiendo), to award successive writs of capias with heavy pecuniary penalties until the person named in the writ has yielded his body to the gaol and prison of the sheriff. But when once he has yielded his body, or been taken into custody, and has been discharged by a court of competent jurisdiction, I can find no authority for a subsequent arrest.

Next, it was argued that he might be re-arrested under a writ de contumace recapiendo. But it is clear from the terms of that writ that it would be inapplicable to such a case as the present. Godolphin describes it as a writ whereby an excommunicated person who has been "unduly delivered" may be again committed to prison. The writ itself (as set out in "Registrum Brevium"), after stating that a complaint had been received from the bishop that the persons named had been liberated from prison "in læsionem libertatis ecclesiasticæ et nostri contemptum manifestum," directed that they should be taken again "nisi modo legitimo a prisone prædicta deliberati fuerint." It is clear that a person discharged by a court of competent jurisdiction has been delivered "modo legitimo," and not in contempt of the sovereign.

Finally, it was said that a new writ de contumace capiendo might be issued under the significavit; but when a writ has been once issued in conformity with the provisions of the 53 Geo. 3, I am at a loss to understand what warrant there would be for issuing a second writ. The truth is, that if your Lordships were to hold that the person named in the writ could be arrested again, after his discharge by a competent court, on the ground that his custody was unlawful, you would not be declaring a law which has hitherto existed, but inventing a fresh power which has never yet and indeed never could have been exercised, in order to meet the altered circumstances created by the jurisdiction which the Court of Appeal is alleged to possess. It may be that there could be another significavit in the ecclesiastical suit, followed by another writ de contumace capiendo. But so there might have been before the Court of Appeal pronounced its judgment just as well as now. The utmost that can be said is, that if an application were made to the High Court for discharge from custody under that writ, the Court would, in all probability, defer to the opinion expressed by the Court of Appeal in the present case on any point of law. But deference in a subsequent proceeding to an expression of opinion by a higher Court in a previous proceeding is, as far as possible, removed from the enforcement of the judgment pronounced in that proceeding. The function of a Court of Appeal is to deal with the

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judgment before it for review, and not to pronounce opinions on a point of law which may remove a difficulty from the path of a litigant in future proceedings. That the exposition of the law by the Court of Appeal might have the suggested effect of removing a barrier to the further action of the Ecclesiastical Court is a mere incident of the present case, not applicable to the class of cases in general; and it is with the general question whether an appeal lies in such cases that we have to deal.

I am driven, then, to the conclusion, that where a person has been discharged by the High Court under a writ of habeas corpus the Court of Appeal has no power effectually to interfere with the action of the Court below. The judgment of the higher Court cannot in any wise affect the discharge or restore to custody the person liberated. It is incompetent to give effect to its judgment, and cannot undo that which it holds to have been wrongly done by the order appealed from.

I think it is impossible to read the section your Lordships have to construe without seeing that the power to hear and determine an appeal, and the power to enforce the judgment of the Court of Appeal in case it should differ in opinion from the Court below, were intended to be co-extensive. And I cannot think that it was ever contemplated that an appeal should be entertained from any class of orders when that which was effected by them could never be effectually interfered with. The jurisdiction of the Courts whose functions were transferred to the High Court, to discharge under a writ of habeas corpus, was well known; and if it had been intended that an appeal should lie against such an order, I think that provision would have been made to enable the Court of Appeal to restore to custody the person erroneously discharged. In the absence of such a power the appeal is futile, and this appears to me to be a sufficient reason for holding that the Legislature did not intend the right to hear and determine appeals to extend to such cases. It was said that it sometimes happens that events subsequent to the judgment of a court of first instance render it impossible for the Court of Appeal to remove the effect of the judgment below, even though it should hold that judgment to have been a wrong one, and that it could not be contended that on this account the

judgment could not be appealed against. This is no doubt true, and many illustrations of it might be given. But the difficulty there arises from the accidental circumstances of the particular case. Here it is inherent in the nature of the order itself in all cases in which a person is discharged from the custody of the law. This distinction appears to me to be a vital one.

I ought to notice the decisions of the Privy Council which were strongly pressed upon your Lordships, though I confess I do not think they have any great bearing upon the present case. It was said that the Privy Council had in these cases reversed the judgment of the Court below, which had discharged a prisoner under a writ of habeas corpus. But it must be observed in the first place, that the power of the Privy Council to enforce its judgments is conferred in very different terms to those which we have been considering (see 3 & 4 Will. 4, c. 41, s. 21).

And next, no question arose there as to the power of the Privy Council to entertain the appeals, and, indeed, no such question could be raised. Her Majesty in Council may entertain an appeal by any person aggrieved by the action of her Colonial Courts, and might well determine a question of law for the purpose of guiding these Courts in the future. The relation of the Queen in Council to the Colonial Courts differs altogether from the statutory relation of the Court of Appeal to the High Court of Justice.

It was contended by the learned counsel for the respondent that, inasmuch as the Legislature had by the Judicature Act limited the number of Courts to which application for a writ of habeas corpus might be made, it had, by way of compensation, given an appeal against the orders made in all such cases. I do not think that such an explanation of the legislation can be sustained. The remedy of habeas corpus would be sought in the majority of cases in a criminal cause or matter where admittedly no appeal has been given. It will be seen that the reasoning which has led me to the conclusion that an appeal will not lie from an order discharging a person from custody under a writ of habeas corpus has no application to an appeal from an order refusing to discharge the applicant. I intend to express no opinion whether there is an appeal in such a case. That question

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does not arise here, and any opinion expressed upon it would be extra-judicial. I refer to it only because it was suggested that if there was an appeal in the one case, it was scarcely to be conceived that there should not be an appeal in the other. I do not think so. There would be to my mind nothing surprising if it should turn out that an appeal lay by one whose discharge had been refused, but that there was no appeal against a discharge from custody. It would be in strict analogy to that which has long been the law. The discharge could never be reviewed or interfered with; the refusal to discharge, on the other hand, was always open to review; and although this review was not, properly speaking, by way of appeal, its practical effect was precisely the same as if it had been.

Another argument was submitted to which I ought, perhaps, to refer. It was urged that the Court of Appeal could, at all events, deal with the costs in the Court below, and that an appeal lay, if only for the purpose of enabling them to do so. But when once the conclusion is reached that, in orders of this description, it was not intended that there should be an appeal on the merits, I think it impossible to hold that it was intended that an appeal should lie merely for the purpose of dealing with costs.

There remains the contention that the proceedings in the present case were irregular, that there ought to have been first a rule to bring into Court the body of the applicant, and then a rule to discharge him from custody. It was said that if this course had been pursued there might well have been an appeal from the first of these rules, as the Court of Appeal would have full power to enforce their judgment in case they considered that there was no ground for bringing up the body of the applicant. It is unnecessary to determine whether an appeal would lie from an order for a writ of habeas corpus if it were brought to the Court of Appeal before there had been a discharge under it. No such point arises here. But the respondent argues that it was not competent for the High Court to discharge the prisoner without having him first brought before them. It was admitted that the procedure adopted was sanctioned by the Crown Office Rules, 1886, but it was suggested that the rule which gives sanction to this course was ultrà vires, inasmuch as the presence in

Court of the person whose custody was in question was essential to the jurisdiction of the High Court to discharge him. No such point was raised on the argument in the present case in the Queen's Bench Division, and the respondent has failed to satisfy me that the rule was ultrà vires. I do not think the authorities cited support the view that what was undoubtedly the practice was essential to the jurisdiction.

I think that the judgment appealed from should be reversed.

LORD MACNAGHTEN :—

My Lords, I concur in the judgment proposed. I only desire to add that I have had an opportunity of reading and considering in print the judgment which has just been delivered by my noble and learned friend Lord Herschell, and that I entirely agree with it.

LORD MORRIS :—

My Lords, I am of opinion that the Court of Appeal rightly decided the preliminary question of jurisdiction raised before them, and that they had jurisdiction to entertain and decide the appeal from the order of the High Court of Justice made upon an application for a writ of habeas corpus. The order of the Queen's Bench Division dated May 20 1887 orders "that a writ of habeas corpus issue directed to the gaoler of Her Majesty's Prison at Walton-on-the-Hill, in the county of Lancaster, commanding him to have the body of" the appellant "before this Court immediately after the receipt of the said writ, then and there to undergo and receive all and singular such matters and things as the said Court shall then and there consider of and concerning him," and further ordering that the said appellant "be discharged out of the custody of the said gaoler as to his detention by virtue of a writ de contumace capiendo issued from the Chancery of Lancashire without being brought up personally before this Court."

The question turns on the construction of the 19th section of the Supreme Court of Judicature Act 1873, which runs thus: "The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as

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hereinafter mentioned, of Her Majesty's High Court of Justice, or of any judges or judge thereof, subject to the provisions of this Act, and to such rules and orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act. For all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court of Justice."

By the 16th section of that Act the whole of the jurisdiction of the several Courts enumerated, amongst which is the Court of Queen's Bench, was transferred to the High Court of Justice. The section collects into the new Court all those various jurisdictions.

That under sect. 19 an order refusing a writ of habeas corpus is appealable from and can be heard and determined by the Court of Appeal was not argued against at your Lordships' Bar on the part of the appellant, and could scarcely, in my opinion, be so argued after the various decisions on such appeals in the Court of Appeal and in your Lordships' House.

Why then should not an order granting a writ of habeas corpus and discharging the prisoner be also appealable from under sect. 19? The argument that no appeal lies in such a case appears to me fallacious upon two grounds, first, because it goes upon the view that the Court of Appeal has no power under the Act and present rules and (what is, I think, involved) could not acquire power by rules which could be lawfully made under the Act, to order a person who had been wrongfully released from legal custody on writ of habeas corpus to be retaken and replaced in his former custody under the former commitment; secondly, because, even if it had not the power, that would not affect the jurisdiction of the Appeal Court to hear and the obligation to determine the appeal and reverse so far as it could the illegal order appealed from. As to the first ground there is to my mind a confusion between the order made on any appeal and the power,

authority and jurisdiction for the enforcement of that order. Sect. 19 undoubtedly gave the Appeal Court power to make orders that could not have been made before, i.e., on appeals from interlocutory orders of the Common Law Divisions; and for the enforcement of those orders the Appeal Court was to have the powers of enforcement the former courts had in respect, not of such orders, for there could not have been any such, but of the orders they lawfully could make,—such powers as attachment, sequestration, etc. If the Appeal Court made an order that the discharged prisoner should attend in court on a specified day, and if he did not, he could be attached and brought up under attachment. Being then in court, whether attending voluntarily and then ordered in custody or brought up in custody under the attachment, the question would be as to the order the Court could then make and not the power of enforcing such order. Why could not the Court of Appeal then lawfully recommit him? No question of enforcement would arise, for, ex hypothesi, he was before the Court in custody. Thus the question turns on the nature of the order the Court of Appeal could lawfully make, and not at all on the enforcement of the order made. The importance of this view appears to me to lie in this, that the limitation by reference to the power vested in the High Court applies only to enforcement, which is not in question, and not to the nature of the order, which is the point in question. The nature of the order the Court of Appeal may make is prescribed by Order LVIII., rule 4, which, inter alia, says, the Court of Appeal "shall have power to make any order which ought to have been made" and which would in this case be to recommit the prisoner. I cannot concur with the argument applying the limitation introduced by reference to the powers of the High Court, to the "order" to be made, which in many cases must be essentially new, instead of to the enforcement of it to which alone the limitation is applied by the second paragraph of the section.

But now I will assume that there would not be under the express words of the 19th section power to enforce the order. Does that necessarily limit the appealable matter? In my judgment, no. The real limits of the appealable matter are

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defined by the first sentence of sect. 19 dealing with jurisdiction to hear and determine. The second sentence is ancillary only to that which is defined by the first sentence, and can neither extend nor restrict it. The exceptions made, such as by sect. 47 of Criminal Matters, shew a clear intention that every order not expressly excepted in the Act should be appealable from.

Now the argument for the appellant engrafts a new exception not mentioned, but said to be implied. And why so? By reason of a sentence intended not to cut down the prior subject-matter but to extend to the entire of it. The first sentence of sect. 19 taken by itself would clearly include the order in this case. The second sentence is ancillary only, and is intended to be co-extensive with the first, and if in result it was not co-extensive, then in my opinion the maxim should come in, "Quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest." Whenever anything is authorized to be done by law and it is impossible to do that thing unless something else not authorized by express terms be also done, then that something else will be supplied by necessary intendment. But without applying this maxim, there is surely at least power to formally reverse the former order. If the order is within the section and appealable from, it cannot be taken out of it by reasoning based on practice or procedure; and if alteration in the latter (namely, practice or procedure) be wanted, the Judges have, in my opinion, full power to make rules as to the practice and procedure suitable for all habeas corpus cases; and if by the present rules the order reversing the order of the Queen's Bench cannot be effective to put the appellant back in prison again, that goes merely to its effect, not to the jurisdiction to make it.

I see no reason why a rule could not be made by the Judges under the Judicature Act whereby in such a case as the present the sheriff could be directed to retake the party discharged and render him to prison, there to remain under the original writ de contumace capiendo. If so, the absence of such a rule should not affect the jurisdiction to hear the appeal.

I confess I am not at all impressed with the arguments derived from "the liberty of the subject" or "constitutional changes." In the first place, no appeals lie from any judgment of the High

Court to the Court of Appeal in criminal matters, and it has been decided that what is criminal matter should be taken in its widest sense. Next, Mr. Jeune, in his very able argument, referred to two cases before the Privy Council. In one, *Reg.* v. *Mount* (1), an appeal was entertained from the judgment of the Supreme Court of Victoria holding that the return to the writ of habeas corpus was bad, and ordering the discharge of the prisoner and setting him at large. Again, in the *Attorney-General for Hong Kong* v. *Kwok-a-Sing* (2), on appeal from two orders of the Supreme Court of Hong Kong, whereby the prisoner was twice released from custody on writs of habeas corpus, while the first order was confirmed, the second was reversed on appeal. Of course, I am aware that these appeals were not brought under a statute, but on petition to Her Majesty referred to the Privy Council. But I fail to see why, if it was not unconstitutional to reverse an order of discharge of a prisoner on writ of habeas corpus under the advice of the Judicial Committee of the Privy Council, it is unconstitutional to do so by the Court of Appeal or by your Lordships' House; provided the intention of the Legislature, as conveyed by the words of the section of the statute, cover the case. The intention of the Legislature in this case, as in others, should be governed by "id voluit, quod dixit," and I cannot attempt to express my opinion better than in adopting the words of Lord Cairns on the construction of this same 19th section, in the case of *Overseers of Walsall* v. *London and North Western Railway Company* (3), as follows: "I do not think it is open to doubt that these clear and definite words of the Legislature must have their full effect given to them. You have here, on the one hand, a rule of the Queen's Bench Division, and, on the other hand, an enactment that every rule of the Queen's Bench Division is to be open to appeal."

In the same case Lord O'Hagan says: "We are acting in our judicial, not in our legislative capacity, and we are not free to act on speculation or theory as to what law would be wisest." I say for myself my duty is "jus dicere," not "jus dare," when construing a statute. I consequently concur in the unanimous

(1) Law Rep. 6 P. C. 283. (2) Law Rep. 5 P. C. 179.
(3) 4 App. Cas. 30, 38.

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judgment of the Court of Appeal that they had jurisdiction to hear and to determine the appeal in this case.

LORD FIELD:—

My Lords, I am of opinion that the order of the Court of Appeal so far as it relates to the point of jurisdiction is correct, and ought to be affirmed.

I think that when the Legislature gave to that Court, as it plainly did, jurisdiction "to hear and determine appeals from any order of the High Court," it rendered all orders in habeas subject to appeal.

I arrive at this result by applying to this statute, to the best of my ability, the well-known and settled rules of construction applicable to all statutes. Admittedly, the word "order" used in the 19th section is comprehensive enough in its literal sense to include the order now in question; but it seems to me that the Legislature has not left the matter standing there; it has reduced the generality of the word "order" to specific orders by making careful and specific exceptions. All orders not excepted, and therefore orders in habeas in civil causes or matters, are thus, in my opinion, included. In order to arrive at the exceptions, which the Legislature has laid down in sects. 47 to 49, the framers of the Act must have passed in review the nature and characteristics of all the various orders which it was competent to the High Court to make; and it has divided those in which an appeal should not be given from those which were to be so liable.

Now the admitted rules of construction, from which I am not at liberty to depart, lay down that I cannot infer an intention contrary to the literal meaning of the words of a statute, unless the context, or the consequences which would ensue from a literal interpretation, justify the inference that the Legislature has not expressed something which it intended to express, or unless such interpretation (in the language of Parke B. in *Becke* v. *Smith* (1)) leads to any manifest "absurdity or repugnance," with this superadded qualification that the absurdity or repugnance must be such as manifested itself to the mind of the lawmaker, and

(1) 2 M. & W. 191, 195.

not such as may appear to be so to me (per Willes J. in *Motteram* v. *Eastern Counties Railway Company* (1)). See the authorities collected in Maxwell on the Interpretation of Statutes, c. 9, s. 1.

These principles were not indeed denied by the appellant's counsel at your Lordships' bar, but they argued that as well from the consequences which would ensue if such an order were liable to appeal, as from the context of the statute itself, it was apparent that the Legislature had not included or intended to include the "order" now in question in the enacting part of sect. 19.

In support of this argument it was correctly stated, as some of the noble and learned Lords who have addressed your Lordships have already pointed out, that at the time of the passing of the Act it was the undoubted right of a subject detained in custody to question by habeas the lawfulness of his detention before every one of Her Majesty's Courts in succession, without regard to the refusal to discharge by any one or more of them; and that if any one Court came to the conclusion that the applicant was entitled to be discharged, no other Court had any power of modification or reversal.

It was argued, therefore, that if the Judicature Act had to be construed as giving a right of appeal to the Crown or prosecutor, that would be so manifest and unreasonable an encroachment upon the rights and liberty of the subject, and so manifestly repugnant, that it could not have been intended by the Legislature.

It was not denied that habeas in some shape or stage was within the contemplation of the Legislature as coming within some of the provisions of the Act in question. Indeed, as one of your Lordships (Lord Bramwell) has pointed out, the jurisdiction of the High Court to issue writs of habeas, and to remand, hold to bail, or discharge, does not exist unless it is conferred by sect. 16. So that habeas is clearly within the provision of that section.

Moreover, it was (in my judgment advisedly) conceded by the appellant's counsel in their arguments before the Lords Justices, that if upon application for habeas, an order of remand was made,

(1) 7 C. B. (N.S.) 58, 80.

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such an order was included in the word "order" in the 19th section. Indeed, this has been so decided, for an appeal was held to lie from an order of attachment in habeas in a civil matter (*Reg.* v. *Barnardo* (1)), and no appeal to lie from an order of remand in a criminal matter as being within the exceptions in sects. 19 and 47: *Ex parte Woodhall* (2).

Now, I quite agree that it does not follow, of necessity, that because an order of remand is liable to appeal, an order of discharge is so. The two orders are, as has been relied upon by some of your Lordships, very different in their nature and consequences. But the admitted intention, or in my judgment the clear intention, to include one form of order in habeas seems to me to render it highly improbable that the eminent lawyers who are thus shewn to have had some forms of order in habeas in their minds, and who were thoroughly acquainted with their several peculiar characteristics, would not, if they had intended to except an order of discharge, have guarded against the alleged encroachment upon the liberty of the subject, by adding that order to the exceptions which they have so carefully specified, and some of which do not seem to me to vie in importance with it.

I also feel the weight of the argument which has commended itself to some of your Lordships, namely, the giving in such a matter a new right of appeal as against a subject where none in point of form, if not in substance, existed before; and, if nothing in the shape of an equivalent had been given, the argument would, although not conclusive to me in face of the actual language of the statute, have derived great additional force. But I cannot conceal from myself that the Legislature has still left to the subject a recourse in succession to such a number of the highest tribunals in the land as, in my judgment, effectually prevents any hurtful consequences from any new limitation which they have effected. Whether they are strictly appeals or not, the subject has still the right of obtaining a practical review of any improper refusal of his application, not only by the Lord Chancellor, and by individual judges, but also by a Court composed of as many judges as the President may think

(1) 23 Q. B. D. 305. (2) 20 Q. B. D. 832.

it right to convene. The Legislature has also given, in my judgment, an appeal to an applicant unjustly committed or held to bail—a new right of enormous advantage.

For these reasons it appears to me that the appellant's argument in this respect fails, and that to construe the 19th section as inclusive of the order of the Divisional Court is imputing a reasonable view to the Legislature rather than anything like absurdity or repugnance. If ever there was a statute to which these elements ought not to be imputed without great necessity, or to which the rules justifying the departure from the literal meaning on the ground of absurdity or repugnance, should be carefully and sparingly applied, the Judicature Acts seem to me to claim that place.

But it was further argued that even if an order for discharge be an order to which the first part of the 19th section would, taken by itself, apply, and if the respondent's contention to that effect was impossible to be resisted, the provisions of the section which follow shew that the Legislature intended some further limitation to be put upon the general words of the first part, and that such limitation was to be found in what was alleged to be the case, namely, that the applicant having once been discharged by the Divisional Court from detention under the writ de contumace capiendo of May 2, 1887, there was no process of any Court or Courts ecclesiastical or lay, by which the applicant could again be brought up "ad subjiciendum" until he should in the words of the writ "have made satisfaction for the contempt" of which he has been adjudged guilty; and that to suppose therefore that the Legislature intended to confer a right of appeal which was said to be absolutely futile was again to suppose an absurdity, rendering it necessary to add to or vary the literal words of the statute.

But although this argument is entitled to very great weight I am unable to yield to it for several reasons. In the first place the words at the end of sect. 19 relied upon in this view do not appear to me to be restrictive, but rather ancillary to the jurisdiction already created. It is "for the purposes of and incidental to that jurisdiction" that the Appeal Court is to have all the powers, authority and jurisdiction by the Act vested in

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the High Court. These words seem to me to be words of complement and not of curtailment.

Neither am I satisfied by the appellant's argument that any such grave blot as it supposes does in fact, under the circumstances in evidence in this case, rest upon the administration of justice in this country, and that no means exist whereby a contumacious subject can be compelled to pay obedience to the authority of the established tribunals of the land. I have listened with care to the arguments upon this point, and I have carefully examined the authorities cited on both sides. In the result I am unable at this moment to say whether the authority of the spiritual Court to signify the persistent contempts and disobedience of the appellant is exhausted, so that a new significavit and a new temporal writ may not issue. One of the noble and learned Lords who have preceded me appears to think such a view is possible.

Neither can I say whether a new writ de contumace capiendo may not issue upon the existing significavit, or whether, the existing writ not having been returned, an arrest may or may not be made under it, or, if that writ is exhausted, whether an alias may or may not issue.

These questions are of a highly technical character. But this I can say, and it seems to me to answer the objection, that whether the appellant's or the respondent's views in this respect are correct, the matter could not have appeared so unmistakably clear to the framers of the Act as to induce me to suppose that upon these grounds they intended what they have not expressed, and have expressed what they did not intend.

I do not propose to discuss the authorities here, not from any want of respect, but because any opinion which I may have formed upon the question raised does not appear to me to bear upon the only question now before your Lordships, which is one of the jurisdiction of the Court of Appeal, and not of what ought to be done upon the appeal.

It also appears to me that Order LVIII., rule 4, forms another answer to the appellant's contention upon this head.

The Court of Appeal has held (rightly or wrongly, for that point has not yet been argued) that the Divisional Court erred

in discharging the appellant from custody, and that the order nisi obtained by him should have been discharged instead of being made absolute. It may be true, and probably is, that the Court of Appeal has no process by which it can do what the Court below ought in that event to have done; but restitutio in integrum is the right of every successful appellant: *Rodgers* v. *Comptoir d'Escompte de Paris* (1), and the Appellate Court by doing part of that which the Court below in the case supposed ought to have done, viz., by discharging the order nisi wrongfully obtained, will not only free the respondent from an erroneous decision which must stand very much in the way of any future attempt to enforce the obedience of the appellant, but will also settle the construction of the important statutes of Elizabeth and Geo. 3, upon which the question on the merits turns.

In the case of *Reg.* v. *Mount* (2), although the respondents had been discharged from custody by the Court below, and had presumably placed themselves outside the jurisdiction of the Colonial Court, the Judicial Committee did not hesitate to reverse the judgment below.

The appellant's counsel also raised some minor points in bar of jurisdiction, but they were not sufficiently weighty to induce me to alter my view, which is that the Court of Appeal had the jurisdiction, and therefore the duty, to determine the appeal.

Order of the Court of Appeal reversed, and judgment of the Queen's Bench Division restored, with costs here and in the Court of Appeal to be paid by the respondent Hakes: cause remitted to the Queen's Bench Division.

Lords' Journals 5th August 1890.

Solicitors for appellant: *Brooks, Jenkins & Co.*

Solicitors for the respondent Hakes: *Girdlestone, Peterson & Todd.*

Solicitor for the respondent Lord Penzance: *The Solicitor to the Treasury.*

(1) Law Rep. 3 P. C. 465.

(2) Law Rep 6 P. C. 283.

[PRIVY COUNCIL.]

J. C.*
1890
July 16, 22, 23.

KING . . . . . APPELLANT;

AND

FROST . . . . . RESPONDENT.

UNDERWOOD AND OTHERS . . . . . APPELLANTS;

AND

FROST . . . . . RESPONDENT.

PRICE AND ANOTHER . . . . . APPELLANTS;

AND

FROST . . . . . RESPONDENT.

PLOMLEY AND OTHERS . . . . . APPELLANTS;

AND

FROST . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Construction—Survivors and Survivor—Intestacy.

Where a specified portion of the testator's real estate, and an equal share of the residue, was by his will devised to each of his five sons for life, with remainder to his children if more than one, with cross-remainders between them; and the will declared that in case of any of the five sons dying without leaving any child or children him or them surviving, "then I devise the share or shares of such son or sons unto and equally between the survivors and survivor of them my said sons, and their respective heirs, as tenants in common in tail":—

Held, that on the death of the last surviving son without issue his share was not disposed of by the above clause; but that as to so much thereof as consisted of specifically devised estate it fell into the residue, and as to so much as consisted of residue, it was undisposed of by the will.

FOUR APPEALS from an order of the Primary Judge in Equity of the Supreme Court (Oct. 9, 1888), whereby he declared that, subject to the interest taken by William Underwood, son of the testator, James Underwood, during his life in the property by

* *Present*:—LORD WATSON, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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the said testator devised to the said William Underwood and his children, either specifically or by way of residuary devise, the said testator died intestate as to the whole of such property.

James died leaving five sons, Joseph, Edward, Richard, Thomas, and William. Joseph, the eldest son and heir-at-law of the testator, died intestate without issue, leaving his brother Edward his heir-at-law. Edward died leaving a will, of which the respondent was the executor. He never barred the estate tail in any of the property vested in him under his father's will. Richard died leaving issue. Thomas also died leaving issue; but he became insolvent, and his interests under the will passed to the appellants Plomley and others. William died last without issue. He was the last surviving son, and had executed a disentailing assurance in his own favour of all property in which he had taken an estate tail under the will or otherwise. He also left a will, and the appellant King took out letters of administration with the will annexed.

The appellants Price and Abbott petitioned the Supreme Court for a declaration that they, as the trustees of a marriage settlement made by the eldest son and heir-at-law of Edward, were entitled to a one-third share of all the real estates devised to William and his children.

The Primary Judge in Equity declared that, subject to the interest taken by William during his life in the property so devised, either specifically or by way of residue, the testator died intestate as to the whole thereof.

The question in the four appeals was as to the correctness of this construction. The material clause is set out in the judgment of their Lordships.

Sir *Horace Davey*, Q.C., and *Rigby*, Q.C. (*Haldane*, Q.C., with them), for the appellant King, the administrator, with the will annexed of William Underwood, contended that on the true construction of the will, William, on becoming the sole survivor, that is, the longst liver of the testator's sons, acquired an estate tail contingent only on his own death without leaving any child him surviving, both in the lands specifically devised to him and his children, and also in the share of the residuary estate so

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devised. The Court at all events was wrong in not recognising that the reversion expectant on William's life estate in the specifically devised estate fell into the residue and devolved accordingly. Reference was made to *Plomley* v. *Felton* (1); *Ware* v. *Varah* (2); *Doe* v. *Wainewright* (3); *Waite* v. *Littlewood* (4); *Lucena* v. *Lucena* (5); *Benn* v. *Benn* (6); *Madan* v. *Taylor* (7); *Davidson* v. *Kimpton* (8); *In re Hutchins' Estate* (9); *In re W. Roper's Estate* (10); *Re Corbett's Trusts* (11); *Nevill* v. *Boddam* (12); *In re Mortimer* (13); *Askew* v. *Askew* (14); *Cooper* v. *Macdonald* (15); *Doe* d. *Wells* v. *Scott* (16); *Green* v. *Dunn* (17).

Buckley, Q.C., and *Joyce*, for Underwood and others, who either beneficially or as trustees claimed under the will of Richard Underwood (a son of the testator), all his interest in his father's estate, contended that both the lands specifically devised to William and his children, as well as those which William derived under the residuary clause, were not undisposed of by James Underwood's will in the events which had happened. Those which were devised to William for life passed under the accruer clause as to one-third to the children of Richard (who with his brothers Edward and Thomas constructively survived William in the person of his descendants), as tenants in common in tail with cross-remainders between them in tail. In any event, the lands specifically devised passed under the residuary devise as to one-fifth to the children of Richard as tenants in common in tail. Reference was made to *Waite* v. *Littlewood* (4); *Hawkins* v. *Hamerton* (18); *Re Corbett's Trusts* (11).

Warmington, Q.C., and *Eady*, for the appellants Price and Abbott, who represented as trustees the interests of the eldest son and heir-at-law of Edward (one of the testator's sons), con-

(1) 14 App Cas 61.
(2) 2 Ch. D. 348.
(3) 5 T. R. 427.
(4) Law Rep. 8 Ch. 70.
(5) 7 Ch. D. 255.
(6) 29 Ch. D. 839.
(7) 45 L. J. (Ch.) 569.
(8) 18 Ch. D. 213.
(9) 19 L. R. Ir. 215.
(10) 41 Ch. D. 409.
(11) Joh. 591.
(12) 28 Beav. 554.
(13) 54 L. J. (Ch.) 414.
(14) 57 L. J. (Ch.) 629.
(15) Law Rep. 16 Eq. 258.
(16) 3 M. & S. 300.
(17) 20 Beav. 6.
(18) 16 Sim. 410.

tended that the lands devised to the survivor for life became, on his death without issue, divisible into shares per stirpes corresponding with the number of sons (viz. three), who died leaving issue. Such shares vested in possession per stirpes for an estate tail in the respective heirs in tail of such sons who died leaving issue. The claim of Edward's eldest son was, therefore, as to one of such shares as heir in tail to his father.

Crackanthorpe, Q.C., and *Eve*, for Plomley and others, who were purchasers from the official assignee of the insolvent estate of the testator's son Thomas of Thomas's interest under his father's will, contended that the three sons of the testator, who died leaving children became entitled in equal shares as tenants in common in tail to the one-fifth share of William Underwood and his children. To impute intestacy to the testator as regards William's share is at variance with his intention as manifested in other parts of the will. As regards the lands specifically devised to William they fell into the residue and were governed by the dispositions contained in the residuary clause. Reference was made to *Smith* v. *Osborne* (1); *Williams* v. *James* (2); *Eyre* v. *Marsden* (3); *Hawkins* v. *Hamerton* (4); *Hodge* v. *Foot* (5); *In re Walker's Estate* (6); *Whytehead* v. *Boulton* (7); *Waite* v. *Littlewood* (8).

Cozens-Hardy, Q.C., and *Farwell*, for the respondent, contended that there was an intestacy as to both the specific and residuary devises in favour of William Underwood and his children. The words "survivors and survivor" ought to be construed in their natural sense.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

James Underwood, who died in 1844, left five sons, all named in his will. To each he gave a specified portion of his real estate,

(1) 6 H. L. 375.
(2) 20 W. R. 1010.
(3) 4 My. & Cr. 231.
(4) 16 Sim. 410.
(5) 34 Beav. 349.
(6) 12 Ch. D. 205.
(7) 41 Ch. D. 525.
(8) Law Rep. 8 Ch. 70.

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and an equal share of the residue. The effect of the will was that each son took for life with remainder to his children, if more than one, as tenants in common in tail, with cross-remainders between them. Then comes this clause, which was referred to in the argument for the sake of convenience as "the accruer clause":—

"I do hereby declare that in case any or either of my said five sons shall depart this life without leaving any child or children him or them surviving, then I devise the share or shares of such son or sons unto and equally between the survivors and survivor of them my said sons and their respective heirs as tenants in common in tail."

There is no gift over in the event of all the sons dying without issue; nor is there any expression of an intention on the part of the testator to keep the property settled in the lines of descent through his sons, except so far as such an intention may be gathered from the limitations already stated, or found in the circumstance that the whole of the testator's real estate was divided among his five sons with the exception of a gift to a grandson the son of a daughter.

Joseph, the eldest son, died in the year 1850, without issue, leaving his four brothers surviving. Then three of the sons died each leaving children. At the last William, the youngest son, died in 1885 without issue. As Joseph and William both died without issue, no question arises as to the meaning of the words "child or children" in the accruer clause.

The question is, what has become of the property devised to William? The Chief Judge in Equity decided that in the events which had happened, William's share was not disposed of by the accruer clause, and that there was an intestacy as to the whole of that share.

The principal contention before his Honour seems to have been the old and familiar contention that the words "survivors and survivor" ought to be read as "others or other."

Before their Lordships that construction, pure and simple, was not advocated by any of the parties to these appeals.

Two alternative constructions were put forward. In the first place it was contended by the principal appellant that the word

"survivor" meant longest liver, and that William, the longest liver of the five brothers, dying without issue, took as tenant in tail the share which had been given to him for life with remainder to his children in tail, and took it on his own death as survivor. That construction has the merit or disadvantage of being ingenious and comparatively novel. The old reports are full of cases on the meaning of the words "survivors or survivor." But this particular construction does not seem to have been discovered until the year 1876, when it was adopted by Jessel, M.R., in *Madan* v. *Taylor* (1). It was said that the introductory words of the accruer clause are applicable to the case of the death of the last brother as well as to the deaths of those who predeceased him. That is perfectly true if you stop there. But if the whole sentence is read together it is apparent that the introductory words must be qualified by limiting them to the case of the death of a son leaving one or more of his brothers surviving, or else if the introductory words apply to every case that there is no one to take on the occasion of the death of the last survivor of the five sons without issue.

Then it was argued on behalf of the other appellants that the survivorship indicated in the accruer clause was either actual survivorship or survivorship in the person of descendants, and that the words "survivors and survivor" were to be read as "others or other," qualified by the condition of real or metaphorical survivorship. That construction may sometimes be required to give effect to a testator's intention; but unless it is required by a clear indication of a scheme of settlement found in the will, it is open to the objection of being at once forced and fanciful.

Unquestionably there are cases in which the Court in construing the words "survivors or survivor" has departed from the ordinary and natural meaning of those words in order to carry out an intention apparent on the face of the will which would otherwise remain unfulfilled. In the present case, however, there is no ground for departing from the obvious ordinary and natural meaning of the word "survivor." It would be difficult to imagine

(1) 45 L. J. (Ch.) 569.

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a case more free from every circumstance which could justify such a departure. The survivorship indicated in the accruer clause must be survivorship with reference to the person on whose death the share is to go over. The obvious meaning of the words "survivors and survivor" in that clause is—such of the sons as may be living at the time of the death on which the disposition of the property is altered.

Their Lordships therefore agree with his Honour that William's share was not disposed of by the accruer clause. So far all the appeals fail.

There is, however, a point to which his Honour's attention does not seem to have been directed.

William's share consisted both of specifically devised real estate and of a share of the residue. So far as it consisted of residue there is an intestacy immediately. But as regards the specifically devised property, the remainder or reversion expectant on William's death without issue was caught by the residuary devise and passed under it.

In this respect the order must be varied.

There must be a declaration that, on the death of William without issue, so much of his share as consisted of the testator's residuary real estate was undisposed of by the will, but that so much thereof as consisted of specifically devised real estate passed by the residuary devise and stood limited upon trust for the five sons of the testator as tenants in common for life with remainders over as in the will mentioned, and that by reason of the death of Joseph Underwood without issue his one-fifth share therein devolved upon his four brothers who survived him as tenants in common in tail, and that in the events which happened William's one-fifth share having already passed as residue was undisposed of by the will.

It must be referred back to the Master in Equity to complete the inquiry directed by the order of the 19th of February, 1886, on the footing of this declaration.

In other respects the order under appeal will stand.

Their Lordships will humbly advise Her Majesty accordingly.

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Their Lordships understand that, subject to their sanction, the parties have arranged that the costs of these appeals shall be borne in the same manner as the costs have been borne in the Court below.

Their Lordships will make an order to that effect.

Solicitors for King: *Rowcliffes, Rawle, Johnstone, & Gregory.*

Solicitors for Underwood and others: *Bell, Brodrick, & Gray.*

Solicitors for Price and another, and for Plomley and others: *Blair & W. B. Girling.*

Solicitors for Frost and others: *Field, Roscoe & Co.*

END OF VOL. XV.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1890, will be as follows:—

In the First Series,
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CANADA, LAW OF—*Law of Lower Canada—C. C. P.* 1034 *and* 1035—31 *Vict. c.* 25—*Letters Patent of Incorporation—Fraud—Annulment of Letters Patent—Writ of Scire Facias.*] Where it appeared that the defendants and others had been incorporated by letters patent issued under the Great Seal of the province, which letters had been obtained by a fraudulent representation that the defendants and others had petitioned for the same, and a writ of scire facias was issued on an information by the Attorney-General against the company, its liquidator, and its judgment creditor, to shew cause why the letters patent should not be declared fraudulent, null, and void, "at least in so far as the said defendants were concerned": —*Held*, under the C. C. P. 1034 and 1035, that the Code does not authorize a partial annulment

CANADA, LAW OF—*continued.*
of letters patent as had been directed by the Court of Queen's Bench Division, that they ought to be entirely annulled, and that the terms of the prayer were wide enough to authorize an order to that effect. LA BANQUE D'HOCHELAGA *v.* MURRAY [414

—— River—Rights of riparian owner - 188
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CARRIER—*Forwarding Agents—Contract—Injury to Goods—"Terra-Cotta Busts"—"Statuary"—Burden of Proof—Practice—Evidence.*] The pursuers wrote to the defenders informing them that they had a quantity of goods for shipment both at Venice and Leghorn, consisting of wooden figures, old cases, marble and terra-cotta busts, marble columns, wood frames, &c., and asking for the defenders' rate for such goods from the above ports to Glasgow by steamer. The defenders replied, "We have the pleasure to quote you for alabaster goods, furniture, &c., but not for goods described as statuary, the rate of 1s. per cubic foot." The pursuers replied, "You seem to make a difference between marble busts and columns and alabaster. Please let us know about this." The defenders, in their reply, informed the pursuers that the rates quoted did not cover insurance risks, but were simply for freight, and gave no answer to the question about the difference between marble busts, columns, and alabaster. Goods were thereupon handed to the defenders at Leghorn, described by the agent who delivered them as eight cases of "terra-cotta bronzed." In an action for damage to such goods during their transit, there was contradictory evidence from witnesses as to whether the goods in question were "statuary":—*Held*, affirming the decision of the Court of Session (16 Court Sess. Cas. 4th Series, 814), first, that the exception of insurance risks did not discharge the defenders from their liability as ordinary carriers; secondly, that the defenders had failed to prove that "terra-cotta busts" came within the exception "goods described."—*Per* LORD WATSON:—General evidence as to the meaning of words of contract ought not to be admitted without a distinct averment on

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record as to the particular words to which the proof is to be directed, and the precise technical or trade meaning which is intended to be attributed to them. SUTTON & Co. *v.* CICERI & Co. - 144
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—— *Buccleuch, Duke of* v. *Metropolitan Board of Works* (Law Rep. 5 H. L. 418) followed
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—— *Glasgow* (*Lord Provost of*) v. *Farie* (13 App. Cas. 657) considered - - 19
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—— *Mersey Docks* v. *Gibbs* (Law Rep. 1 H. L. 93) approved - - - - - 400
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—— New Zealand - - - - 429
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—— Victoria - - - - - 384
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—— Western Australia - - - 195
See WESTERN AUSTRALIA, LAW OF.
COMPANY — *Shares* — *Pledge of Certificates* — *Blank Indorsement*—*Brokers*—*Mercantile Usage*—*Defective Title*—*Estoppel.*] The registered owner of shares in a New York company held certificates which stated that the shares were held by him and were transferable in person or by attorney on the books of the company only on the surrender and cancellation of the certificate by an indorsement thereof. The indorsement was in the form of a transfer for value received, blank in the names of the transferor and tranferee, with a power of attorney in blank to carry out the transfer. On the death of the owner his executors obtained probate of his will, and in order that the shares might be registered in their own names signed as executors the transfers on the back of each certificate, without filling up the blanks, and sent the certificates to their broker, who fraudulently deposited the certificates with a bank which took them bonâ fide and without notice as security for advances. The bank retained the certificates and
COMPANY—*continued.*
took no steps to obtain registration. By the law of New York such a delivery of signed transfers by the registered owner of shares would estop him from setting up his title against a purchaser for value without notice. But neither on the New York nor on the London Stock Exchange are transfers so signed by executors treated as being in order or received as sufficient security for advances, unless duly authenticated. The executors having brought an action against the bank to establish their title to the certificates:—*Held*, that since all the dealings with the certificates were transacted in England by persons domiciled there, the respective rights of the executors and the bank must be determined by English law; that the conduct of the executors in delivering the transfers was consistent either with an intention to sell or pledge the shares or to have themselves registered as the owners, and therefore did not estop them from setting up their title as against the bank, for the bank ought to have inquired into the broker's authority.—The decision of the Court of Appeal (38 Ch. D. 388) affirmed. COLONIAL BANK *v.* CADY AND WILLIAMS. LONDON CHARTERED BANK OF AUSTRALIA *v.* CADY AND WILLIAMS - - - - - - 267
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ENDOWED SCHOOLS ACT (32 & 33 *Vict. c.* 56, *ss.* 5, 11, 13, 14 (1), 16, 29, 39 (3), 42—*Educational Endowments—Vested Interests—Rights of Patronage—Conscience Clause.*] *Held*, that the original site of Christ's Hospital and the gifts made to it having been continuously applied to education by a governing body separately established for that purpose, such endowments are educational within the meaning of sect. 5 of the Endowed Schools Act, 1869, and also that endowments applied to the maintenance of scholars are educational under sect. 29.—*Held*, that endowments given subsequently to the 2nd of August, 1819, and legitimately spent in improving or maintaining the hospital property, need not be traced and excluded from the Commissioners' scheme as requiring the consent of the governing body thereto under sect. 14 (1).—*Held*, that the scheme requiring persons in charge of a boarding-house to allow their boarders exemptions from prayers and religious worship was in that respect unauthorized by the Act. Provision should be made under sect. 16 to enable the scholar obtaining such exemptions to attend the school as a day scholar.—*Held*, that Donation Governors having rights of patronage are entitled to be heard on the question, whether the scheme is or is not in conformity with sect. 39 (3), as being persons directly affected thereby. Rights of patronage, however, are not vested interests under sect. 13, or educational interests under sect. 11. A scheme which pays regard not illusory but substantial to those rights conforms to the Act.—*Held*, that the Corporation of the City of London being a portion of the governing body, and legally seised of the estates of the Hospital, but without powers of management, is not the governing body under sect. 39, and has no locus standi in that capacity.—*Held*, that Guy's Hospital, being by the terms of its foundation liable to pay an annuity to Christ's Hospital, and only possessing rights of patronage corresponding thereto, without powers of management, has no locus standi under sect. 39.—*Held*, that under sect. 42 an appeal having relation to an endowment, the average gross annual income of which during the three years next before the commencement of the Act is not more than £100, cannot be entertained. *In re* ENDOWED SCHOOLS ACT, 1869. *In re* CHRIST'S HOSPITAL - - - - 172

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—— To modify terms of absolute conveyance—Mortgage - - - - 379
See MORTGAGE.

FOREIGN JUDGMENT — *Action on — Foreign Judgment not enforceable here unless final and conclusive—Res Judicata.*] An action cannot be brought in this country upon a foreign judgment for the recovery of a debt, if the judgment does not finally and conclusively (subject to an appeal to a higher Court) settle the existence of the debt so as to become res judicata between the parties. —By Spanish law in certain cases summary or "executive" proceedings can be taken to recover a debt, and the plaintiff if successful obtains a "remate" judgment for the recovery of a sum of money. Such a judgment is final in those proceedings unless reversed or varied on appeal. In such proceedings the defendant can plead certain limited defences but cannot set up any defence affecting the validity of the contract. Either plaintiff or defendant, if unsuccessful in the "executive" proceedings, may in the same Court and in respect of the same subject-matter take ordinary or "plenary" proceedings, in which all defences and the whole merits of the matter may be gone into. In the "plenary" proceedings the "remate" judgment cannot be set up as res judicata or otherwise. A "remate" judgment can be enforced by the plaintiff on giving security, although either an appeal or "plenary" proceedings may be pending. A "plenary" judgment renders the "remate" judgment inoperative and requires restoration of any moneys paid under it:—*Held*, affirming the decision of the Court of Appeal (37 Ch. D. 244), that since a "remate" judgment does not finally and conclusively establish the existence of a debt no action can be brought upon it in this country. NOUVION *v.* FREEMAN - - - - - - 1

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GIBRALTAR, LAW OF—*Liability of a Statutory Body—Construction of Statutes—Nonfeasance—Claim for Damages.*] The liability of a body created by statute is governed by the statutes which create it. The powers conferred when exercised at all must be executed with due care. In the absence of a contrary intention, its duties and liabilities are the same as those imposed by the general law on a private person doing the same thing. But for mere nonfeasance no action lies except in regard to a duty towards the plaintiff imposed by the statute, and negligently omitted.—*Mersey Docks* v. *Gibbs* (Law Rep. 1 H. L. 93) approved.—In an action to recover damages for injury to the respondents' property arising from the fall of an overhanging road, consequent upon the giving way of its retaining wall, which the appellant corporation was under a statutory duty to maintain for the purposes merely of road conservancy, it appeared that the result was due to original defects in the structure of the wall, and that the appellant was not negligently ignorant thereof, and not guilty of misfeasance:—*Held*, that, according to the true construction of the Orders in Council constituting the appellant corporation, it was vested with administrative powers, subject to the control of the Government, and that there was no intention to render it responsible to the respondents in respect of such injury. SANITARY COMMISSIONERS OF GIBRALTAR *v.* ORFILA - - - 400

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INCOME TAX—*Bodies Corporate or Unincorporate—Income or Profits of Company—Duty—Exemption — Property appropriated for Promotion of Science—Customs and Inland Revenue Act*, 1885 (48 & 49 *Vict. c.* 51) s. 11, *sub-s.* 3.] By sect. 11 of the Customs and Inland Revenue Act 1885 a duty is imposed upon the annual value, income or profits of property belonging to any body corporate or unincorporate, subject to an exemption by sub-sect. 3 in favour of "property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts."—In this exemption "science" is not confined to pure or speculative science, or science generally, but includes various branches of science:—*Held*, by Lords Watson and Macnaghten, Lord Halsbury L.C. dissenting, that the property of the Institution of Civil Engineers was entitled to the exemption, because it was in fact legally appropriated and applied substantially for the promotion of mechanical or engineering science, and not for the promotion of the professional interest or advantage of the members. —The decision of the Court of Appeal (20 Q. B. D. 621) affirmed. COMMISSIONERS OF INLAND REVENUE *v.* FORREST - - - - - 334

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LIMESTONE—Minerals under railway—Surface working - - - - - 19
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LOCAL GOVERNMENT ACT—*Rural Authority —Powers for Lighting District—Order of Local Government Board—Assessment of Railway Company—Public Health Act* 1875 (38 & 39 *Vict. c.* 55), *ss.* 161, 211, 229, 276.] The first paragraph of sect. 161 of the Public Health Act 1875 empowers an urban sanitary authority to contract with any person for the supply of gas, or other means of lighting the streets, markets, and public buildings in their district and to provide the necessary materials. The Local Government Board declared by an order under sect. 276 of that Act that the provisions of the first paragraph of sect. 161 should be in force within certain portions of a rural sanitary district, and invested the rural sanitary authority with all the powers, rights, capacities, &c., of an urban sanitary authority "under those provisions" within such portions of the district. The rural authority incurred lighting expenses under this order, and treated them as general expenses under sect. 229 of the Act. A poor rate having been made to defray the expenses a railway company was assessed in respect of the full rateable value of its property, which consisted of land occupied and used as a railway:—*Held*, that upon the true construction of the order the rural authority was invested only with the power of an urban authority to incur lighting expenses under the provisions of the first paragraph of sect. 161 and not with the rating powers applicable to an urban authority under the Act; that the expenses were rightly treated as general and not as special expenses under sect. 229; and that the company was not entitled to be rated under sect. 211 of the Act and in the proportion of one-fourth part only of the rateable value.—The decision of the Court of Appeal (23 Q. B. D. 555) affirmed. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY *v.* ASSESSMENT COMMITTEE OF BOLTON UNION AND OVERSEERS OF POOR FOR THE TOWNSHIP OF GREAT LEVER - - - - - - 323

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MISREPRESENTATION—Contract for sale of entailed estate—Scotch law - 108
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MORTGAGE—*Absolute Conveyance—Admissibility of Evidence to contract Terms of the Deed.*] Where the appellant had deposited with the respondent bank his title-deeds to certain property in order to secure a cash credit, and afterwards executed an absolute conveyance thereof to the bank in pursuance of an agreement recited therein to the effect that the price paid should be by deducting £400 from the amount due:—*Held*, that, although collateral evidence was admissible to shew that notwithstanding the plain terms of the deed the relationship of mortgagee and mortgagor still subsisted between the parties, yet in this case it was wholly insufficient to overcome the presumption that the deed of conveyance truly stated the transaction. BARTON *v.* BANK OF NEW SOUTH WALES - - - - - 379

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NEW SOUTH WALES, LAW OF—*Compensation for Lands taken—Mineral Contents of Land—Onus Probandi—Practice as to New Trial.*]—

NEW SOUTH WALES, LAW OF—*continued.*

Where in an action for compensation in respect of land compulsorily taken for public purposes the jury, after hearing the conflicting evidence of experts as to the existence of payable coal thereunder, assessed damages in respect thereof:—*Held*, that their verdict, being one which a jury could reasonably find, could not be set aside as against the weight of evidence.—There is no rule which imposes upon a plaintiff in order to sustain such a verdict, the burden of proving by costly experiments the mineral contents of his land; nor does it follow that because a seam of coal is not presently workable at a profit that no compensation is to be given for it if it is likely to prove profitable in the future. BROWN *v.* COMMISSIONER FOR RAILWAYS - - - - 210

2. —— *Crown Lands Act of* 1884—*Appraisement by Local Land Board—Power of Minister for Lands.*] *Held*, that under the New South Wales Crown Lands Act of 1884, the minister for lands has not the power to determine that either the yearly rental or yearly licence fee in respect of the leasehold and resumed areas of a pastoral holding shall be at a higher rate than that appraised by the Local Land Board in the mode provided by the Act. If the minister dissents from such appraisement he can remit the same to the Local Land Board for revision. ALISON *v.* BURNS - - - - - - - 44

3. —— *Insolvent Act*, s. 41—*Bill of Sale—Distress for Rent—Right of Landlord.*] *Held*, that according to the true construction of New South Wales Insolvent Act (5 Vict. No. 17), s. 41, the prohibition of "distress for rent" after sequestration of the tenant's estate does not authorize the holder of a bill of sale to take his goods (the subject of such bill) out of the hands of the landlord's bailiff in possession thereof under such distress. RAILTON *v.* WOOD - 363

NEW ZEALAND, LAW OF—*Timaru Harbour Act*, 1876—*The Harbours Acts*, 1878 *and* 1886—*Powers of the Harbour Board—Pilotage Contract—Statutory Liability.*] *Held*, that the respondent harbour board, as constituted by the Timaru Harbour Act, 1876, and the Harbours Act, 1878, had no authority under the statutes or the rules thereunder made to enter into pilotage contracts, but only to license pilots. Consequently it could not be held responsible for the default of its harbour master, who was acting not as harbour master but as pilot engaged by the appellants for their vessel, at the time when vessel and cargo were lost. SHAW, SAVILL AND ALBION COMPANY *v.* TIMARU HARBOUR BOARD - - - 429

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PATENT—*Provisional Specification — Complete Specification—"Distinct Statement of the Invention claimed"—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 5, *sub-s.* 3, 5, *s.* 26, *sub-s.* 3.] The enactment in sect. 5, sub-sect. 5 of the Patents, Designs, and Trade Marks Act, 1883, that a complete specification must end with a distinct statement of the invention claimed is directory only, and non-compliance with it does not invalidate a patent.—The decision of the Court of Appeal (39 Ch. D. 92) affirmed.—By LORD HALSBURY, L.C.:—It is an essential condition of a good patent that the invention described in the provisional should be the same as that in the complete specification, and non-compliance with this condition is by sect. 26, subsect. 3 of the Act preserved as a ground upon which the infringement of a patent right may be defended and a patent may be revoked. VICKERS, SONS & CO. *v.* SIDDELL - - - 496

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See NEW ZEALAND, LAW OF.

PRACTICE—*Appeal - Jurisdiction of the Court of Appeal—Habeas Corpus—Order discharging Prisoner—"Criminal Cause or Matter"—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 19, 47—*Rules of the Supreme Court, Order LVIII., r.* 4.] Where a person has been discharged from custody by an order of the High Court under a habeas corpus the Court of Appeal has no jurisdiction to entertain an appeal under the Judicature Act, 1873.—So *held* by Lord Halsbury, L.C., and Lords Watson, Bramwell, Herschell, and Macnaghten, Lords Morris and Field dissenting.—A clerk having been sued in an Ecclesiastical Court for offences against the ritual of the Church and pronounced guilty of contempt and contumacy, a writ de contumace capiendo was issued, and he was arrested and imprisoned. A rule nisi for a habeas corpus having been granted, the Queen's Bench Division made the rule absolute and the clerk was discharged from custody. The Court of Appeal having reversed the order making the rule absolute:—*Held*, that the appeal to the Court of Appeal was not "in a criminal cause or matter" within s. 47 of the Judicature Act, 1873; but that no appeal lay to the Court of Appeal under s. 19 from an order discharging a prisoner under a habeas corpus.—The decision of the Court of Appeal (20 Q. B. D. 1) reversed, and the decision of the Queen's Bench Division (19 Q. B. D. 307) restored on the above ground. COX *v.* HAKES [506

2. —— *Discovery—Documents of Title—Privilege—Affidavit of Documents—Interrogatories in Cross-examination—Contentious Affidavit.*] The defendant in an action for recovery of land having made an affidavit of documents, which stated that he had in his possession certain documents numbered and tied up in a bundle marked with the letter A, and that he objected to produce such documents on the ground that they related solely to his own title, and did not in any way tend to prove or support the title of the plaintiffs, the plaintiffs administered interrogatories to the defendant, asking whether such documents did not include a will mentioned in the statement of claim and relied upon by the plaintiffs in support of their title, and whether the defendant had ever seen the will, and, if so, when last and where. The defendant objected to answer the interrogatories. The plaintiffs thereupon applied for an order that the defendant should further answer, and at the hearing sought to make use of an affidavit in contradiction of defendant's affidavit of documents:—*Held*, that the affidavit of documents was sufficient, and need not allege that

PRACTICE—*continued.*
the documents did not impeach the defence; that a contentious affidavit was not admissible to contradict the defendant's affidavit of documents, and that the plaintiffs were not entitled to a further answer. The decision of the Court of Appeal (23 Q. B. D. 287) affirmed. MORRIS *v.* EDWARDS - - - - - 309

3. —— *Divorce—Wife's Costs of Appeal refused—Evidence—Adultery—Perjury.*] The rule as to the wife's costs in a matrimonial suit is that except in very exceptional cases she is not entitled to be paid her costs by the husband, except upon the theory that she is still his wife. Therefore, where a wife appealed from a judgment of divorce against her for adultery and the appeal was dismissed, her costs were refused. BEGG *v.* BEGG - - - - - 170

4. —— *Striking out Statement of Claim—Frivolous and Oppressive Action—Statute of Limitations* (3 & 4 *Will.* 4, *c.* 27), *s.* 26—*Concealed Fraud.*] In a case of concealed fraud within sect. 26 of the Statute of Limitations (3 & 4 Will. 4, c. 27), it is not enough to prove a concealed fraud: the plaintiff must shew that he or some person through whom he claims has been by such fraud deprived of the land sought to be recovered, and that the fraud could not with reasonable diligence have been known or discovered more than the statutory period before the action was brought. In such an action general averments of fraud are not sufficient: the statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the deprivation, and excluding other possible causes. In default of such allegations the Court may, by virtue of its inherent jurisdiction, dismiss the action as an abuse of the procedure, where the claim is incapable of proof and without any solid basis. The decision of the Court of Appeal (39 Ch. D. 213) affirmed. LAWRANCE *v.* NORREYS AND OTHERS - - 210

5. —— *Verdict in pursuance of an Award—Costs—Powers of Court and Taxing Master.*] Where by a consent decree arbitrators were directed to return a general award on the whole declaration for a sum certain, and such award was thereby directed to be entered as a verdict whereon final judgment might be signed, and costs of the action, reference, and award were directed to follow the verdict so entered:—*Held*, that, the appellants having thereunder obtained a verdict for a portion of the sum claimed by them, which verdict carried costs as above directed, the Court could not give the respondent a verdict for the residue of the sum claimed, and then delegate to the Taxing Master the duty of ascertaining, by the evidence of the arbitrators and others, as to what parts of the appellants' claim the respondent had succeeded, with a view to the apportionment of costs:—*Held*, further, that such evidence would be inadmissible as tending to explain or contradict the award. *Duke of Buccleuch* v. *Metropolitan Board of Works* (Law. Rep. 5 H. L. 418) followed. O'ROURKE AND ANOTHER *v.* COMMISSIONER FOR RAILWAYS 371

6. —— *Verdict of Jury—Application to Set Aside.*] A verdict of a jury will not be disturbed as against evidence or the weight of evidence, unless it is one which a jury, viewing the whole of the evidence reasonably, could not properly find. PHILLIPS *v.* MARTIN - - - 193

—— New trial—Weight of evidence.
See NEW SOUTH WALES, LAW OF. 1.

PRINCIPAL AND AGENT—*Authority of Agent to Borrow—Liability of Principal where Agent exceeds his Authority.*] Where an agent under his power of attorney possessed implied authority to raise money by loan for the purpose of carrying on the business affairs entrusted to him, which authority under circumstances of emergency must be deemed to include power to borrow on exceptional terms outside the ordinary course of business:—*Held*, that the lender was not bound to inquire whether in the particular case the emergency had arisen or not; but that he was entitled to recover from the principal if he lent to the agent bonâ fide and without notice that the agent was exceeding his mandate. MONTAIGNAC *v.* SHITTA - - - - - 357

PRIVILEGE—Production of documents - 309
See PRACTICE. 2.

PROBATE DUTY—*Revenue—Partnership—Local situation of business in England or India.*] In an action for probate duty it appeared that the deceased had been member of a partnership firm. By the articles of partnership it was provided that the business should be the carrying on and working of certain silks and indigo concerns, and zemindaries for the production or manufacture or working of indigo and silk and other produce, and for the sale in Calcutta or shipment for realization in Europe of such produce. The articles further provided that the entire business of the firm in India should be carried on by certain managing agents who were required to be partners, who were alone entitled to use the name of the firm, to keep the books, and prepare the balance-sheets, and who were also empowered (but subject to the opinion of the committee hereinafter mentioned) to determine what branches of business should be undertaken. A committee of the partners in England was appointed to advise with the agents both in London and Calcutta on all matters affecting the interest of the partnership, and subject to the approval of a general meeting of the partners to decide all matters affecting the partnership. It was further provided that on the death of any partner his representative should not become a partner in respect of his share, but that the interest of the deceased partner should cease from the 30th of September next after his decease, with power for the representatives to sell the share within a stipulated period or else to receive its fair value. A firm in London were declared to be the agents of the partnership in Europe, to whom the produce of the firm was to be consigned and the proceeds of the sales in India were to be remitted. The London agents were to make the advances necessary for carrying on the business, and held a mortgage over the assets, which were vested in trustees resident in the United Kingdom. The estates cultivated by the firm were situated in India, and the business properly so called was entirely carried on there. There were sixteen

PROBATE DUTY—*continued.*
partners all but two of whom resided in the United Kingdom:—*Held*, reversing the decision of the Court of Session (16 Court Sess. Cas. 4th Series (Rettie), 959), that the share or interest of the deceased in the partnership was not property situated in the United Kingdom, and was therefore not liable to probate duty. Laidlay *v.* The Lord Advocate - - - 468

RAILWAY COMPANY—*Mines of Minerals under or near Railway—Minerals got by quarrying—Limestone—Notice by Owner of intention to work—Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77, 78, 79.] The "mines of coal, ironstone, slate, and other minerals" which sect. 77 of the Railways Clauses Act, 1845, excepts out of the conveyance to the railway company, and the "mines or minerals" under the railway, or within the specified distance, which sect. 78 empowers the owner to give notice of his intention to work, include not only beds and seams of minerals got by underground working, but also such as can only be worked, and according to the custom of the district would be properly worked, by open or surface operations.—So *held* by Lords Herschell and Watson, Lord Macnaghten dissenting and retaining the opinion he expressed in *Lord Provost of Glasgow* v. *Farie* (13 App. Cas. 657).—To justify an owner in giving such a notice it is not necessary that he should intend to work the minerals himself, but there must be a real and bonâ fide desire to work either by himself or by his lessees or licensees.—Limestone is a mineral within the meaning of the above sections.—The decision of the Court of Appeal (37 Ch. D. 386) affirmed. Midland Railway Company *v.* Robinson - - - - - 19

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RIVER—*Rights of Riparian Owner—Navigable River—Damages.*] *Held*, that a riparian owner is at liberty to construct and moor to his bank a floating wharf and boathouse, the same not being an obstruction to the navigation, and is entitled to maintain an action for the damage in respect thereof caused by any unauthorized interference with the flow and purity of the stream. Booth *v.* Ratté - - - - - - 188

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See Local Government Act.

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SALE OF GOODS—*Stoppage in transitu—Right of Vendor—Duration of transitus.*] Where goods are intended by the purchaser to pass direct from the possession of the vendors into the possession of a carrier, to be carried to a destination contemplated at the time of purchase by both parties:—*Held*, that, whether or not delivery has been made to the carrier in such sense as to pass the property to the purchaser as owner, the goods, though held by the carrier as the purchaser's agent, are in transitu till the destination is reached; and that the vendors have the right to stop them.—*Bethell* v. *Clark* (20 Q. B. D. 615) approved. Lyons *v.* Hoffnung - - - - 391

SALMON FISHERY—Royal charter—Compulsory grants - - - - 52
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SCHOOL—Endowed Schools Act - - 172
See Endowed Schools Act.

SCIENTIFIC SOCIETY—Income tax—Exemption - - - - - 334
See Income Tax.

SCOTCH LAW—*Arbitration—Agreement to refer—Arbiter not expressly named—Delectus personæ—Words "more or less," Construction of.*] By the law of Scotland, an agreement to refer future disputes, if and when they shall arise, to a person unnamed, and designated only by his filling a particular office or position, is not binding. And the parties entering into such an agreement must be held to have contracted on the footing of this rule.—By agreement in writing between the pursuers and the defenders the pursuers agreed to supply "the whole steel" required for the Forth Bridge, less 12,000 tons of plates, subject to the conditions herein contained, at certain prices. The conditions contained these clauses: "The estimated quantity of steel we understand to be 30,000 tons, more or less." "Any question that may arise as to the meaning or intent of this contract to be settled in the case of difference by the engineer of the Forth Bridge for the time being, whose decision shall be binding upon both parties":—*Held*, affirming the decision of the Court of Session (15 and 16 Court Sess. Cas. 4th Series, 215 and 440), first, that the arbitration clause was not binding; secondly, that the pursuers were entitled to supply the whole of the steel required for the bridge, and that their right was not qualified or affected by the statement that the estimated quantity which would be required was understood to be "30,000 tons, more or less." Tancred, Arrol & Co. *v.* Steel Company of Scotland - - - - 125

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2. —— *Bankruptcy—Sequestration—Oath of Creditor, Verity of—Appeals in formâ pauperis—Bankruptcy (Scotland) Act*, 1856 (19 & 20 *Vict. c.* 79), *ss.* 9, 15, 22.] Decision of the Court of Session affirmed. — Their Lordships were of opinion that some means ought to be devised to put a stop to cases being brought in formâ pauperis on appeal to the House of Lords for which there was not the slightest shadow of foundation. BLAIR *v.* NORTH BRITISH AND MERCANTILE INSURANCE COMPANY - - 495

3. —— *Entail—Sale of Entailed Estate "subject to Ratification"—Specific Performance—English and Scotch Law—Scotch Entailed Estates Acts* (11 & 12 *Vict. c.* 36; 16 & 17 *Vict. c.* 94; 38 & 39 *Vict. c.* 61; 45 & 46 *Vict. c.* 53).] By the Scottish Entail Amendment Acts (11 & 12 Vict. c. 36, s. 4; 16 & 17 Vict. c. 94, s. 5; 38 & 39 Vict. c. 61, ss. 5, 6; 45 & 46 Vict. c. 53, s. 13), the heir of entail in possession of an entailed estate is authorized to sell such estate, and to execute a deed of conveyance for giving effect to such sale, and the Court, upon an application for its sanction thereto, and upon such consents as are required by the recited Acts being obtained, shall approve such sale, with power to dispense with the consent of any heir entitled to succeed, and to ascertain the value of his expectancy; and thereupon the deed shall have the same effect as if it had been executed at the sight of the Court in terms of the recited Acts.—By 45 & 46 Vict. c. 53, ss. 19, 20, 21, 22, it is further provided that any such heir of entail may apply to the Court for an "order of sale" of the estate, with a view to the substitution of money for the entailed estate, and the Court, subject to certain restrictions, may order it to be sold by public auction or private bargain, provided that the sale should not be by private bargain if either the applicant or the next heir shall intimate within one month after the order for sale that he desires the sale to be by public auction.—The appellant, heir in possession of entailed estates, by a letter under his own hand, offered to sell the estates to the respondent at a fixed price. The letter contained these words: "The sale is made subject to the ratification of the Court." The offer was accepted. The appellant presented a petition for an order of sale of the estate under the last-mentioned provisions of 45 & 46 Vict. c. 53, contending that this was a discharge of his obligation to take steps for obtaining the ratification of the Court, and thereupon the next and only heir of entail objected to the sale as being against his patrimonial rights, and demanded a sale by public auction:—*Held*, affirming the decision of the Court of Session (16 Court Sess. Cas. 4th Series, 421), that the procedure adopted by the appellant for obtaining the ratification of the sale was not such as was contemplated by the contract, and that he was bound to take the requisite steps under the earlier Acts for disposing of the estates without the consent of the other heirs of entail:—*Held*, further, that the acts required on the part of the appellant to complete the sale were not of such a character as to make a decree for specific performance improper. STEWART *v.* KENNEDY (No. 1) - 75

4. —— *Entail—Sale of Entailed Estate—Reduction—Essential Error induced by Misrepresentation—Issues for Trial.*] An error entertained by one of the parties to a contract of sale as to the legal meaning of the contract is not by itself sufficient to invalidate his consent to the contract.—The appellant made the respondent an offer of his entailed estates at a certain price by a letter which contained this stipulation, "The sale is made subject to the ratification of the Court." The offer was accepted. This offer and acceptance, according to their proper construction, constituted an absolute and unconditional sale of the entailed estates. In an action by the appellant of reduction of the letter of offer the Court of Session granted him an issue of facility and circumvention only. He asked for one other issue, either the second of essential error, or the third of essential error, induced by the respondent's agent, or the fourth of essential error, induced by fraudulent representations. He alleged the respondent's agent gave him a draft of the offer, to copy and sign as his own letter, representing that the effect of writing the letter would be "merely to give to him" (the appellant) "a little hold on" the respondent; and that he was not aware of any mode of selling an entailed estate except under the Act of 1882, under which the Court judged of the sufficiency of the price:—*Held*, affirming the decision of the Court of Session (16 Court Sess. Cas. 4th Series, 857), that the appellant could not claim to have the contract reduced merely because he understood it to be other than it really was, and therefore he was not entitled to the second issue.—But *held*, reversing the decision of the Court of Session, that the appellant's averments did relevantly raise the matter of representation by the respondent's agent, and therefore he was entitled to the third issue. STEWART *v.* KENNEDY (No. 2) - - - - - - 108

5. —— *Husband and Wife—Post-nuptial Contract—Ante-nuptial becoming Unsuitable—De Presenti Conveyance, or Testamentary Deed—"Heirs and Assignees."*] A husband and wife, by post-nuptial contract, dated 1850, reciting that their ante-nuptial contract, dated 1817, had become unsuited to their present circumstances, agreed to a new arrangement of their individual property after the death of the predecessor. The husband bound himself and his heirs to make payment to the wife, should she survive him, of an annuity during her life of £2000 a year, with the use of his house, furniture, wine, &c. The wife accepted this in full of all legal claims: "and for which causes and on the other part" she "has given, granted and disponed, as she does hereby give, grant, assign, and dispone from her, her heirs and successors, to and in favour" of the husband, "his heirs and assignees whomsoever, heritably and irredeemably, all and sundry her whole estate, goods, chattels, and effects, heritable and moveable, real and personal, now pertaining and belonging to her, or that shall happen to pertain and belong to her in any manner of way, and wherever situated, at the time of her death," including her claims under the ante-nuptial contract. She then gave her husband power to uplift the whole heritable and moveable estate, and nominated him "sole executor and universal legator"; and

SCOTCH LAW—*continued.*

constituted him and his foresaids her assignees, not only to the whole titles of her estate, but also to the rents payable in all time coming from "the last term of Whitsunday." The deed contained a power during the joint lives to alter. Part of the wife's moveable estate consisted of a share of the residue of her grandfather's estate, given to her in life-rent, exclusive of her husband, with, failing children, a general power of appointment over the corpus. The husband predeceased, bequeathing all his property to trustees. The husband's representatives, on the ground that this fund had not vested in the husband, claimed it as conditional institutes in the post-nuptial contract: —*Held*, reversing the decision of the Court of Session, that the post-nuptial contract was not a testamentary deed, but a deed of mutual contract, and that the right which each party obtained was a right of credit which vested at once, and therefore the share of residue passed by the husband's will and vested in his trustees. M'ONIE *v.* WHYTE - - - - - - 156

6. —— *Jurisdiction—Arrestment ad fundandam jurisdictionem—Judgment for Costs—Solicitor's Lien—Act* 23 & 24 *Vict. c.* 127, *s.* 28.] The appellant, a domiciled Englishman, being defendant in an action in the Queen's Bench Division, obtained, on the 25th of April, 1887, judgment for costs against W., the plaintiff, who was a domiciled Scotchman.—On the 26th of May the respondent executed an arrestment ad fundandam jurisdictionem against W. of the amount due under the judgment, and his summons was served on the appellant on the following day.—On the 18th of June the appellant's solicitors in the action in the Queen's Bench Division obtained a charging order under 23 & 24 Vict. c. 127, s. 28, upon the costs recovered by him in the action:—*Held*, affirming the decision of the Court of Session (16 Court Sess. Cas. 4th Series (Rettie), 927), Lord Morris dissenting, that even assuming that the charging order was retrospective in its operation, the arrestment was effectual for the purpose of founding jurisdiction, as such arrestment could in no way affect the operation of the charging order. NORTH *v.* STEWART - - - 462

7. —— *Salmon Fishery — Royal Charter—Competing Grants — Possession — Rod Fishing.*] The appellants were the proprietors of salmon fishings derived from the town of Inverness. They produced a Crown charter, dated 1591, purporting to be a renewal grant confirming to the town of Inverness "all and whole the waters of Ness, with all the salmon fishings thereof from the stone 'C.' to the sea." Admittedly this grant did not include two fishings within those limits which had existed from a very early period under different grants.—The respondent was the proprietor of the land "H.," which bordered one side of the river Ness, and is situated nearly equally above and below "C." He possessed one-half of "H." under a Crown charter of confirmation on resignation, dated 1566, granting "Half the lands of 'H.,' with the salmon fishings pertaining to the same, on the water of Ness," with an infeftment taken in 1706, which ran, "Half the lands of 'H.,' and half the fishings." He held the other half of "H." under a grant

SCOTCH LAW—*continued.*

which contained no mention of fishings. He and his predecessors had always enjoyed without question the salmon fishings opposite that part of "H." lying above "C." There was no exact description of the two halves of "H." The appellants claimed to have the exclusive right to the fishing below "C.," as against the respondent: —*Held*, reversing the decision of the Court of Session (15 Court Sess. Cas. 4th Series, 833), that there was no contradiction between the two titles, and that the appellants were entitled to the exclusive enjoyment below "C.," as against the respondent; his possession of the fishings above "C." fully satisfying his title. WARRAND *v.* MACKINTOSH - - - - - - 52

8. —— *Succession—Election between provisions under Father's Will and Legitim—Essential Error —Judgment of Court below affirmed—Appeal withdrawn—Form of Order.*] INGLIS *v.* INGLIS OR BREEN - - - - - - - 169

9. —— *Will—Succession—Period of Vesting, Acceleration of—Effect of Wife's Repudiation of her Testamentary Provisions.*] By trust disposition and settlement a truster who died in 1865 directed his trustees to hold his whole estate, in order to pay his wife an annuity and to accumulate the balance of the income till her death, and "as soon after the death of my said wife as convenient" to convey specific heritable subjects to certain of his children, to realize the whole residue, and, having invested £1000 for the life-rent benefit of another child with the fee to his children, to divide the remaining residue among his four children; declaring that if any of the children "predeceased the term of payment of their provisions without leaving issue" his or her provisions under the deed "should lapse and fall into residue." The residue was to be divided in the proportion of one share to each surviving child, and one share among the children of each deceasing child.—The widow repudiated, immediately after the truster's death, her testamentary provisions, and elected to take her legal rights of terce and jus relictæ. One child died without issue in 1866. The period allowed by the Thellusson Act (39 & 40 Geo. 3, c. 98) for accumulation came to an end in 1886; and in that year one of the children and the representative of the husband of the deceased child claimed, in contradiction to the contention of the other children, that the fund in respect of the widow's repudiation had vested a morte testatoris. The widow was still alive:—*Held*, reversing the decision of the Court of Session (15 Court Sess. Cas. 4th Series (Rettie), 254) that the beneficial fee of the specific heritable subjects and the residue did not vest until the death of the truster's widow, that her repudiation of her testamentary provision could not accelerate the distribution of the fund, and that until her death the beneficiaries could not be ascertained.—*Lucas's Trustees* v. *The Lucas Trust* (8 Court Sess. Cas. 4th Series (Rettie), 502) doubted.—*Annandale* v. *Macniven* (9 Court Sess. Cas. 2nd Series (Dunlop) 1201) explained. MUIRHEAD *v.* MUIRHEAD 289

SEQUESTRATION—Bankruptcy—Scotch law.
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SHIP—*Collision — Damages —Demurrage — Loss of Profits—Expenses of Detention.*] Indemnity for consequential loss from detention of a vessel can only be recovered where there has been actual loss resulting therefrom, and reasonable proof of its amount. In estimating damages resulting from a collision, *held*, that a claim for demurrage during the detention of the injured vessel in port whilst a substituted vessel, belonging to the same owners, was doing at the defendants' expense and indemnity for loss occasioned by the substitution, the work which the injured vessel ought to have done, must be disallowed.—*The Black Prince* (1 Lush. 568) distinguished.—*Held*, further, that so far as the claim for demurrage may have related to actual expenses incurred for the detained vessel, such as the lodging, maintenance, and wages of the crew, as distinct from loss of profits arising from loss of the use of the vessel, a reference should be made to ascertain them, not to the registrar of the Court below, but, under the circumstances of the case, to the Registrar of Her Majesty in Ecclesiastical and Maritime Appeals. THE "CITY OF PEKING" *v.* THE COMPAGNIE DES MESSAGERIES MARITIMES AND OTHERS. THE "CITY OF PEKING" [438

2. —— *Collision—Sailing Rules—Arts.* 18, 22 *—Negligence.*] Where in a collision it appeared that one vessel had been navigated with reckless negligence and the other had committed a comparatively venial error in not slackening speed in good time:—*Held*, that a regulation for preventing collisions at sea having been infringed by the latter vessel without necessity, it could not be absolved from the consequences prescribed by statute and must be held to be liable. THE OCEAN STEAMSHIP COMPANY *v.* APCAR AND COMPANY. THE "ABRATOON APCAR" - - - - 37

3. —— *Collision—Sailing Rules—Negligence.*] The decision of the Court of Appeal (14 P. D. 53) reversed, and the decision of Butt, J., restored, on the ground that upon the evidence as it stood at the trial there was no sufficient proof that the master of the *Tasmania* was guilty of negligence on account of which that ship should be held to blame, the decision of the Court of Appeal being based upon a point not suggested at the trial. THE OWNERS OF THE SHIP "TASMANIA" *v.* SMITH AND OTHERS. THE "TASMANIA" - - 223

SOLICITOR—*Costs—Taxation—Country Solicitor and London Agent—Bill of Agency Charges—Taxation of Part of Bill—Solicitors Act* 1843 (6 & 7 *Vict. c.* 73), *s.* 37.] The Court has no power, under sect. 37 of the Solicitors Act 1843 (6 & 7 Vict. c. 73), to direct taxation of a part only of a solicitor's bill of costs; but the Court has such a power by virtue of its inherent jurisdiction and apart from statute.—Taxation of part of an agency bill of costs may be directed upon the terms of payment into Court by the applicants of the whole amount claimed to be due by the agents.—The decision of the Court of Appeal (37 Ch. D 433) affirmed with a variation. STOBER & Co. *v* JOHNSON AND WEATHERALL 203

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13 Vict. No. 11, s. 18—*New South Wales* 363
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19 & 20 Vict. c. 79, ss. 9, 15, 22—*Bankruptcy—Scotland* - - - - 495
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32 & 33 Vict. c. 56—*Endowed Schools* - 172
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36 & 37 Vict. c. 66, ss. 19, 47—*Judicature Act*
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TRADE-MARK—*Registration—Special and distinctive Words used as a Trade-mark before the passing of the Act of* 1875—*Words descriptive of Article—Words used in conjunction with other Words—Trade Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *s.* 10.] To entitle "any special and distinctive word or words" to be registered as a trade-mark under the Trade Marks Registration Act, 1875, s. 10, they must have been used alone as a trade mark before the passing of the Act and not merely in combination with other words.—Before the passing of the Trade Marks Registration Act, 1875, the appellants used the words "Perry Davis' Vegetable Pain Killer" as their trade-mark for a medicine manufactured and sold by them. After the passing of the Act they registered the words "Pain Killer" as their trade-mark under sect. 10. Upon a motion to amend the register:—*Held*, affirming the decision of the Court of Appeal, that the entry must be removed from the register, the words "Pain Killer" not having been used alone before the passing of the Act:—*Held*, also, by Lord Halsbury, L.C., and Lord Morris, that the words "Pain Killer" were not special and distinctive words within the meaning of sect. 10, there being nothing to distinguish goods manufactured by the appellants from goods manufactured by other persons. PERRY DAVIS & SON *v.* HARBORD - - 316

2. *Registration—Words calculated to Deceive—Application of Words to a different Article—"Fruit Salt"—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 73.] The Patents, Designs, and Trade Marks Act, 1883, confers upon the comptroller a discretion whether to register a trade-mark or not, and he ought to refuse registration where it is not clear that deception may not result.—The respondent applied to register the words "Dunn's Fruit Salt Baking Powder" as a trade-mark for baking powder. The appellant, who had for many years used the words "Fruit Salt" as his trade-mark for a powder used in producing an effervescing drink, opposed the application:—*Held*, by Lords Watson, Herschell, and Macnaghten (Lord Halsbury, L.C., and Lord Morris dissenting), that upon the evidence the proposed words were as a matter of fact calculated to deceive the public, that the case therefore fell within sect. 73 of the Patents, Designs, and Trade Marks Act, 1883, and that the trade-mark ought not to be registered. The decision of the Court of Appeal (41 Ch. D. 439) reversed, and the decision of Kay, J., restored. ENO *v.* DUNN - - 252

VENDOR AND PURCHASER—*Condition of defeasance—Right to rescind.*] In an action by purchasers for specific performance of a contract for the sale of some real property which contained a proviso to the effect that the vendor might annul the sale on his being unwilling or unable to remove any objection to title, it appeared that the purchasers conditionally offered to give time for the removal of their objection and that the vendor in good faith objected to the conditions, and was threatened with litigation in consequence:—*Held*, that the vendor was entitled to rescind. WOOLCOTT *v.* PEGGIE - - 42

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VICTORIA, LAW OF—*Public Service Act*, 1883, *s.* 49—*Powers of Classifiers—Construction—Junior Assistant.*] Where under Victorian Public Service Act, 1883, s. 49, every school-teacher employed in a State school at the date of the Act was directed to be classified as in the Act provided, and the classifiers thereunder assigned to the respondent the status of a junior assistant:—*Held*, that, according to the true construction of the Act, the respondent not being in point of fact at the date of the Act a junior assistant, could not legally be classified as such; but that, having had at that time a definite status as assistant teacher, she was entitled to be classified accordingly.—The term "junior assistant" was not interpreted by the Act, and did not denote any denomination of teacher existing at its date, and there was no power under the Act to apply the term to the respondent so as to alter her position. MAIN *v.* STARK - - - - - - 384

WESTERN AUSTRALIA, LAW OF—*Transfer of Land Act*, 1874, *ss.* 19, 21, 120—*Absence of Caveat—Power of Commissioner to refuse Registration.*] *Held*, that according to the true construction of sections 19 and 21 of the Transfer of Land Act, 1874, the commission is not bound to register title merely by reason of the issue of the prescribed notices and the non-appearance of a caveat. Such notices may produce information, and the commissioner, in consequence thereof or of reconsideration, has a discretion to refuse to register, subject to the opinion of the Supreme Court under sect. 120. MANNING *v.* COMMISSIONER OF TITLES [195

WILL—*Survivors and Survivor—Intestacy.*] Where a specified portion of the testator's real estate, and an equal share of the residue, was by his will devised to each of his five sons for life, with remainder to his children if more than one, with cross remainders between them; and the will declared that in case of any of the five sons dying without leaving any child or children him or them surviving, "then I devise the share or shares of such son or sons unto and equally between the survivors and survivor of them my said sons, and their respective heirs, as tenants in common in tail":—*Held*, that on the death of the last surviving son without issue his share was not disposed of by the above clause; but that as to so much thereof as consisted of specifically devised estate it fell into the residue, and as to so

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much as consisted of residue, it was undisposed of by the will. KING *v.* FROST. UNDERWOOD *v.* FROST. PRICE *v.* FROST. PLOMLEY *v.* FROST 548

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